IN THE

Supreme Court of the United States

No. 40,
October Term, 1924.

UNITED STATES OF AMERICA,
Petitioner,

vs.

GULF REFINING COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

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Statement.

After this case was brought here by writ of certiorari upon the Government's petition, the respondent moved to dismiss the writ or affirm the judgment of the Circuit Court of Appeals. With these motions the respondent filed its argument, in which it contended that review by certiorari of a judgment of the Circuit Court of Appeals awarding a new trial in a criminal case, was not within the appellate jurisdiction of this Court, or, even if within such jurisdiction, that the writ had issued improvidently on the erroneous representations contained in the Government's petition, and, in any event, even though the writ properly issued, the judgment of the Circuit

Court of Appeals directing a new trial should be affirmed because of the numerous errors committed on the trial.

In response to these motions the Solicitor General filed a brief on behalf of the United States, which he announced would stand as the Government's brief on the merits as well. The Director General of Railroads was also permitted to file a brief as *amicus curiae*.

The Court reserved further consideration of the motions to dismiss or affirm until the hearing on the merits.

PART I.

Jurisdiction.

The Government's whole case is dependent on one single issue of fact; that is, whether the material shipped to respondent was gasoline, and not properly describable as unrefined naptha as contended by respondent.

Finding numerous other errors, the Circuit Court of Appeals also held that the District Court erred in refusing to grant the respondent's motion for an instructed verdict, upon the ground that, stripped of a mass of evidence erroneously admitted, the conclusion was inescapable that the material in question could not properly be called gasoline.

Laboring under the erroneous assumption that the Circuit Court of Appeals had directed that the indictment be dismissed, instead of that a new trial be awarded, the posture of the Government on its petition for the writ was that, conceding the other errors, the Circuit Court of Appeals was warranted in "at most remanding the case for a new trial" (*Petition, V*). On the error of this assumption becoming evident, the position of the Government now is, first, that there were no errors committed on the trial, and second, even if there were any such errors, that at least the conclusion of the Circuit Court of Appeals that the material in question could not

be called gasoline is erroneous in fact, and it at least should not be allowed to stand, because it is contended that the Government will be prejudiced in other cases and in other matters if the *opinion* of the Circuit Court of Appeals on this point is allowed to stand unreversed.

The respondent does not concede that the Government will be prejudiced in the more important respects contended in the petition, which matter will be considered hereinafter, but, to the extent that it is true that the Government will be prejudiced in other cases by the opinion of the Circuit Court of Appeals, it follows that in asking this Court to pass upon this issue of fact and reach a contrary conclusion to that reached by the Circuit Court of Appeals the Government is seeking not merely to remove such prejudice, but instead to create a situation of prejudice against respondent and certain individuals in such other cases.

As therefore the principal ground upon which the Government contends the writ should be retained and the opinion of the Circuit Court of Appeals reviewed depends upon the Government's contention that the Circuit Court of Appeals erred in holding that the material could not properly be called gasoline, the Government in its brief has elaborately abstracted the evidence tending to substantiate its contention that the material should be called gasoline; which renders it necessary for the respondent to deal with this issue of fact under this point of the brief instead of in its normal place.

There is no dispute between the parties as to the identity of the substance shipped. The dispute is as to its proper name.

The material in question is the liquid condensate (blended or unblended, as hereinafter described) of a gas flowing from oil wells called casinghead gas. The condensate is commonly called casinghead gasoline.

At the time the shipments moved there were in force rates on "gasoline" and also on "unrefined naptha", the

latter substantially lower than the former; but none under the description "casinghead gasoline". The material was shipped to respondent under the designation "unrefined naptha", and the rate applicable thereto paid.

The indictment alleges that gasoline was transported, and in the District Court the Government attempted to prove that the material is in fact gasoline. The respondent, on the other hand, offered proof that the material is not gasoline, and, further, that the term "unrefined naptha" is an appropriate description for it.

When the gas is liquefied by compression the condensate has a vapor tension in excess of 10 pounds to the square inch.

Under what are known as the Safe Transportation Regulations of the Interstate Commerce Commission and the carriers, liquid condensate having a vapor tension in excess of 10 pounds to the square inch cannot be shipped in ordinary tank cars, and must be shipped in special equipment. In order, therefore, to bring the condensate to below ten pounds vapor tension, so that it may be shipped in ordinary tank cars, it was the practice of the respondent's subsidiary at one of its plants to subject the condensate to a process called "weathering", which consists in heating it, and thus driving off the lighter particles, and at the other two plants to reduce the tension of the condensate by blending with it naptha shipped from the refinery at Port Arthur to the casinghead plant for that purpose. The naptha is a substantially heavier product than the condensate, and by the addition of one-third of the heavy naptha to two-thirds of the condensate the blend was brought to a vapor tension just under 10 pounds. The term "naptha", as last used, is the specific name of one of the products of the distillation of petroleum. The word "naptha" however is also a generic name, embracing all those fractions and their products arising from the distillation of petroleum which are lighter than kerosene. In its generic use the

term "naptha" therefore embraces naptha (specific), benzine and gasoline, as well as the mass of material from which they are extracted.

None of the foregoing facts are disputed. The dispute hinges on the proper definition of the word "gasoline" and the propriety of calling the material "unrefined" naptha.

Conceding, for the purposes of the argument under this point, that all the proof offered by the Government was properly admissible, it amounts in substance to this:

(1) On Direct. That before the establishment of the unrefined naptha rates respondent's subsidiary shipped to it the identical commodity described as gasoline, and that respondent's traffic manager wrote letters to the carriers during such preceding time requesting the establishment of rates on gasoline to cover the movement of the commodity;

(2) That coincident with shipments to Port Arthur under the designation "unrefined naptha", other shipments were made to Pittsburgh—to which point there were no unrefined naptha rates—of the same material described as "gasoline".

(3) That some employees around the casinghead plant were accustomed to calling the material "gasoline";

(4) That other shippers of material, in some instances identified as being substantially similar to that shipped to respondent, in other instances the material not particularly identified as being similar, and in still other instances material shown to be decidedly different, called it "gasoline" and shipped it under the designation "gasoline"; there being no unrefined naptha rates in effect to the points to which they shipped;

(5) That still other shippers shipping substantially the same material, where there were unrefined naptha rates available, had shipped it as "gasoline";

(6) That certain employees at respondent's refinery had been accustomed to designate the material as "Kiefer gasoline" or "Kiefer gas" in certain records, which records had been erased and mutilated prior to their production before the grand jury.

(7) And extracts from the Interstate Commerce Commission's safe transportation regulations, permitting during a part of the period of time the use of the description "gasoline", and during the balance of the time requiring the use of one of the descriptions "gasoline", "casinghead gasoline" or "casinghead naptha" (which last description respondent did use in compliance with the rule, in addition to the term "unrefined naptha").

In opposition to this evidence the defendant called six expert witnesses—five of them unconnected with it, and including some of the most eminent petroleum engineers in the world—all of whom testified unequivocally that the material in question was not gasoline in any proper sense of that word. They gave varying definitions of the word "gasoline", but all in substance agreed that it was a product of petroleum within certain ranges of boiling points, suitable for every-day use for carbureting or vaporization purposes, such as operating an automobile, gasoline stove, or launch; and that this material, on account of a preponderance of so-called lighter ends, and because of its volatility, and other objections mentioned, would not comply with any specification for gasoline and would not be suitable for such ordinary every-day use. They testified further that in order to make the material into gasoline it was customary to send it to a refinery—as was respondent's custom—in order that its boiling points might be corrected by blending it with heavier material; that blending was an important part of the art of refining; that the material unquestionably came within the generic description "naptha", and that since it was necessary to subject it to further blending—a refining process—the designation "unrefined naptha" was

entirely appropriate. It was also shown by one or more of them that a certain standard work on the technology of petroleum used the term "unrefined naptha", and defined it as being naptha within certain boiling-point limits, within which limits this material is embraced. They also testified that they had made certain tests with the material and that it refused absolutely to budge an ordinary motor car under ordinary circumstances.

The respondent further offered to prove, but was not permitted to do so, that it was contrary to the laws of Oklahoma to sell the material as gasoline and it was not treated as such for taxation and inspection, and that it was contrary to the laws of Texas to sell, ship or for any other purpose to describe this material as gasoline. Respondent also offered to prove, but was not permitted to do so, that the only other shipper who shipped the material as gasoline, where unrefined naptha rates were available, had, after discovering these rates, filed suit for the recovery of the difference between the gasoline and the unrefined naptha rates, and that that suit was then pending undecided.

Respondent also showed that it had never sold any of the material as gasoline, but that all of it shipped to Port Arthur was there blended with other materials to make gasoline.

The Government was then allowed to call in rebuttal two petroleum engineers, both of whom testified that the material was gasoline and could not appropriately be called "unrefined naptha". The first admitted, however, that he used the word "gasoline" as a generic word interchangeable with "naptha" in its generic sense, and he admitted that the material was unfinished, needing correction of its boiling points before being usable for ordinary purposes of gasoline, and that, while he himself could so use it, he would not trust it to his wife for use in place of gasoline. He also admitted that "naptha" would be a proper designation, but based his contention

that it could not be called "unrefined naptha" on the ground that he considered the material pure, that is, free of impurities, and that he construed the word "refining" as being limited to the removal of impurities. Under this construction of the term, a crude petroleum oil, free of impurities, would be refined oil—a patent contradiction in terms.

The other Government expert took the same position in regard to the meaning of the word "unrefined", but he was forced to admit the authorship of an article prepared by him, and issued as an official bulletin by the Bureau of Mines, stating that the condensate was too volatile and dangerous and not suitable for use as gasoline.

During the trial joint tests were conducted by the experts of both sides, in an effort to see whether the material would operate a car satisfactorily; and in three out of the four tests that utterly failed, and in the fourth it succeeded in operating a car, only under the most favorable circumstances, long after midnight, at very low temperature, when the volatility would be at its minimum.

The foregoing is the substance of all the evidence in the case, and it is submitted that the conclusion of the Circuit Court of Appeals was clearly right.

As previousy stated, substantially the whole issue on the trial was whether or not the material should properly be called "gasoline", and this was necessarily so because the indictment alleges that the material shipped was gasoline; and proof that it was anything else, regardless of the rates upon which it ought to be shipped, would clearly be a fatal variance.

The Director General, however, in this Court, for the first time attempts to assert a new theory of the case, supported by a disingenuous argument. His position is, in substance, that, assuming the material is not actually gasoline, nevertheless the Interstate Commerce Com-

mission, in its regulations governing the safe transportation of dangerous or explosive articles, has provided a rule which during a portion of the time covered by the indictment provided that the material *may be* shipped as "gasoline" and during the remainder of the time *must be* shipped as "gasoline", "casinghead gasoline" or "casinghead naptha"; that these rules, as required by the Commission, are published by the carriers in their classifications; that these classifications are filed with the Interstate Commerce Commission as tariffs, and that accordingly they become controlling descriptions for rate purposes. In other words, his contention is that, supposing for reasons of safety the Interstate Commerce Commission had promulgated a rule requiring that kerosene *should be* billed and placarded as "gasoline" or *might be* billed and placarded as "gasoline", the publication of such rule by the carriers in their classifications would automatically make applicable the gasoline rate on kerosene, although there might be rates specifically published applicable to kerosene. If the contention had any merit, it is obvious that the indictment would not fit. It would have been necessary to allege that the material shipped was the liquid condensate of casinghead gas below 10 pounds vapor tension; that by reason of the regulation of the Commission the rate applicable thereon was that applicable to gasoline, and that the defendant had paid a lesser rate. But the contention is without merit in any event.

As pointed out in the argument in support of the motions to dismiss or affirm (*pp. 26, 27*), these very same regulations contain another rule requiring that all articles

> "must be properly described by the shipper in his shipping order and bill of lading under the specific or general name provided for the description of such freight by the carrier's classification and *tariff governing.*"

The further contention of the Director General, that the efficacy of the safe transportation rules, as such, will be destroyed if the opinion of the Circuit Court of Appeals is not reversed, is utterly without merit, and can scarcely be made with good grace by the Government in the face of the knowledge it possesses that there are still pending untried in the District Court other indictments expressly charging violation of the Safe Transportation Regulations in regard to the same matters herein involved, upon which indictments there will be abundant opportunity to hold the respondent accountable, if these rules have in any wise been violated.

In their efforts to find material to support the contentions which they claim warrant the review of this case by certiorari, the Solicitor General and the Director General in their briefs have given such erroneous, garbled and fragmentary statements of the evidence that it becomes necessary to review it completely under this point of respondent's brief instead of in its normal place.

The facts shown by the evidence are as follows:

Petroleum oil is a mixture of various hydrocarbons. In the process of refining, it is separated into various fractions, the process consisting in the segregation of those hydrocarbons of certain boiling points or gravities which go to make up the respective finished products of petroleum, such as gasoline, naphtha, benzine, kerosene, gas oil, fuel oil, lubricating oil and waxes. The hydrocarbons which are lighter in gravity than those used to make kerosene (being the ones which are used to make gasoline, naphtha, and benzine) are collectively called—both scientifically and commonly—the naphtha fraction of petroleum oil. Naphtha is a generic name, covering finished gasoline, naphtha and benzine, as well as the materials of which they are composed; and it is also a specific name of the narrower subdivision of itself used for making paints, varnish, and for other purposes (*Rec., pp. 587-589, 691, 700, 710, 711, 887*).

Coincident with the flow of oil from a well, a certain gas comes off, commonly called casinghead gas (*Rec., p. 186*). This gas contains a quantity of light hydrocarbons identical with the lighter hydrocarbons embraced within the naphtha fraction of petroleum oil, but in vapor form (*Rec., p. 887*). Whether this gas comes off, and is a part of, petroleum oil, is not known to science; there being two theories: one that it does and is, and the other that the gas comes from other sources, but occupies the same fissures or chambers in the earth that are occupied by the petroleum oil, and consequently escapes with it (*Rec., p. 890*). It is scientifically known that naphtha gas may and does arise from sources entirely independent of petroleum oil (*Rec., p. 691*). For many years, this casinghead gas was wasted, although it was recognized that the hydrocarbons contained in it could be utilized in the making of gasoline the same as the similar hydrocarbons contained in petroleum oil (*Rec., p. 690*).

After considerable experimentation, a satisfactory process was evolved for the capture of these hydrocarbons and their reduction to liquid form by compression of the gas (*Rec., p. 690*). This led to the erection in the State of Oklahoma by the Gypsy Oil Company (affiliated with the defendant) of what are known as compression casinghead plants, the first constructed beginning in 1913, being rapidly followed by others, until there are now many compression plants (and plants using other processes, not here important) employed in the process mentioned.

The liquid condensate of the gas (quite commonly called "casinghead gasoline") is extremely volatile, and the greater portion of it would, unless confined, very quickly return to a state of vapor (*Rec., p. 591*). It is not practically usable, nor is it the same, as the commodity commonly known as gasoline used for running motor cars, gasoline launches, gasoline stoves, etc. It will not run a car satisfactorily (*Rec., pp. 695, 698, 884, 886*),

and frequently will not run it at all (*Rec., pp. 695, 857, 858*), and the Government's expert witness testified that he would not trust his wife to attempt to run a car with it unless he was with her (*Rec., p. 883*) and that it is not suitable for general use by "common people" as distinguished from an expert like himself (*Rec., p. 883*).

The commodity commonly known as "gasoline" consists of an aggregation of lighter hydrocarbons within a limited range (determined by varying standards prescribed by government regulations, state laws, purchaser's specifications or the individual manufacturer's own specifications, and other conditions), which upon fractional distillation will begin to boil at a certain temperature, certain percentages of which will distill over at certain other temperatures, which will not completely distill over short of a certain maximum temperature, and which will produce a certain minimum recovery after distillation. The most important difference between it and the so-called casinghead gasoline—or liquid condensate of casinghead gas—is that the latter is composed principally of the lighter gravity hydrocarbons only, and does not include sufficient of the heavier hydrocarbons, embraced within the range compassed by gasoline, as a consequence of which its initial boiling point is very much lower than that of gasoline, and its "end point" likewise substantially lower, and the recovery after distillation much less (*Rec., pp. 691, 699, 700, 887, 889*).

Fractional distillation for the purpose of testing a material consists in running a sample of the material through a small still known as an Engler flask.

The War Department specifications—which are the same as defendant's own standard—require that before material will pass as gasoline it must meet the following specifications:

> Upon distillation its initial boiling point shall be at not less than 140 degrees Fahrenheit; not less than 20% must be distilled at 221 degrees; not

less than 45% at 275 degrees; not less than 90% at 356 degrees; and must be completely distilled over —the flask being dry—at 428 degrees; and, of special importance, there must be a recovery of not less than 95% of the material, that is, there must not be a loss upon distillation of more than 5% of the material distilled. In addition to these requirements, it must be free from odor, and must be what is technically known as water-white in color. Water-white color is determined by an instrument known as the Sayboldt Chromometer (*Rec., pp. 290-312, 730, 768*).

A product substantially identical with the liquid condensate occurs in other ways. In the course of distillation at a refinery, these same lighter hydrocarbons vaporize, and would escape but for the fact that they are recaptured and put through a compression plant and liquefied; this condensate being called "still gas gasoline." This is, of course, likewise not a completed marketable gasoline, but is run on through other processes and blended into gasoline materials (*Rec., pp. 700-1, 838, 841-2*). Again, a like vapor arises in large crude oil tanks on tank farms, and it is sometimes captured and condensed. Aside from this, there is a product substantially similar, but not identical, which is variously known as "lighter ends", "tops", "skimming", and perhaps other names, consisting in naphtha hydrocarbons driven off crude oil by the application of heat in what are known as "skimming" or "topping plants". These tops while within the range of the naphtha fraction contain a somewhat larger percentage of the heavier hydrocarbons embraced therein than does the liquid condensate of casing-head gas. Topping is practically a crude initial step in refining by a plant not equipped to go further in the processes of refining, which generally sells or ships the tops to a refiner, where they are further processed in the making of gasoline (*Rec., pp. 592-3, 615-618, 693*).

The liquid condensate is not sold for use as or in place of gasoline; but, so far as it is dealt in commercially, is sold to refiners or others, to be used by blending with heavier hydrocarbon of the naphtha fraction, and to thus produce gasoline (*Rec., pp. 693, 854-5*). While the liquid condensate in the state in which it comes from the compressors can be shipped in specially constructed insulated tank cars, the general practice is to reduce its vapor tension to not exceeding 10 pounds per square inch, either by a process known as "weathering" (consisting simply in allowing the more volatile portions to escape), or by a process known as "blending" (which consists in the addition of crude naphtha or some other heavier petroleum distillate), or both weathering and blending to such extent as will reduce the vapor pressure to 10 pounds and act as a sort of carrier or sponge to prevent loss by escape of the gas, and at that pressure it is shipped in ordinary tank cars (*Rec., pp. 194-196, 202-204, 213, 214, 237, 591, 859-60*). This blend of liquid condensate and naphtha is more nearly identical in the range of hydrocarbons embraced within the tops above described than is the unblended liquid condensate (*Rec., p. 693*). It is possible, however, to blend the liquid condensate with a sufficient additional quantity of naphtha to make a product somewhat similar to refinery-made gasoline, and this is done to some extent, and the product sold as gasoline (*Rec., pp. 695, 743-6*).

In the beginning, the Gypsy Oil Company tried this method, and the defendant sold the product as "blended gasoline" (*Rec., pp. 555, 556*). On account, however, of excessive loss and the unsatisfactory results of the use of this material and because the sale of it was injuring the reputation of its standard refinery-made gasoline, the company soon discontinued any effort at the casinghead plants to so blend the liquid condensate as to make a product salable as gasoline, and, instead, began shipping the liquid condensate blended sufficiently only to reduce

its vapor tension to 10 pounds (or weathered to that point) to its Porth Arthur refinery. The product has ever since at this refinery been expertly blended with and into other materials in such quantities and under such conditions as to produce a product meeting the requirements of commercial gasoline (*Rec., pp. 678-680*). In some cases this was not possible and the material was distilled.

Blending is one of the processes of the art of refining petroleum oils applied not only to gasoline, but lubricating oils and other products, and is a delicate and expert operation (*Rec., pp. 689, 690, 691, 743-7*). Sometimes the liquid condensate when it arrives at Port Arthur is found to be "off color" or to contain a deleterious quantity of sulphur; in either of these cases it is necessary to subject it to other processes, wherein it becomes simply mingled with and loses its identity in other materials undergoing such processes in the regular course of manufacture of gasoline by the refinery (*Rec., pp. 255-6, 860*). If, however, it is free from these objectionable features, as is most commonly the case, it is possible to blend it with and into gasoline with a recovery in excess of 95%, purposely so made at the refinery in order to be able to accommodate the injection into it of quantities of the liquid condensate running from 5% to 25% of the whole. The operation of blending is performed either in tanks, or in ships' holds so constructed as to permit of the operation. It consists in the mixing, by a man of long experience guided by the distillation tests, of such quantities of the two materials as will meet the specifications. After they have been combined, a distillation test is made to ascertain whether the operation has resulted in producing a material meeting the specifications, and, if not, in what respect the blend is deficient. Naturally the operation rarely produces the required result on the first attempt, and it is usually necessary to add more of one or the other of the materials and again test; and to continue

the operation of adding and testing after each addition until the specifications are met. Ordinarily it takes about three attempts before success (*Rec., pp. 254-60, 312-23, 582-602*).

A very small quantity of the liquid condensate (blended to 10 lbs. vapor pressure) was also shipped to a blending plant owned by the defendant at Pittsburgh, Penna., where it was utilized by blending it with other material obtained at that point from other sources.

The "blended gasoline" which was shipped commercially in the earlier years was described and shipped as "gasoline"; and it is conceded by the defendant that that word was and can still be applied to this material without impropriety. When the material which was shipped to Port Arthur, however, first began moving, it also was shipped and described as "gasoline," there being no classification or commodity rating expressly covering it, and gasoline being the nearest analogous classification thereto.

Inasmuch as the material being shipped to Port Arthur was in an unfinished state—and being sent there for the purpose of undergoing further refining process—the defendant besought the carriers to lower their gasoline rates between the points involved or establish what is commonly known as a "milling-in-transit" basis to cover the movement, such as is commonly established by carriers to cover partially manufactured articles stopped to be finished in transit. But the carriers were unwilling to establish that basis (*Rec., pp. 559-566*).

On May 7, 1912, the Interstate Commerce Commission rendered its decision and report in a case then pending before it, entitled *National Refining Company* v. *Missouri, Kansas & Texas Railway Company, et al.*, (23 I. C. C. 527). That case sought a determination as to the rate properly to be applied on tops or lighter ends shipped from a skimming plant at Muskogee, Oklahoma, to a refinery at Coffeyville, Kansas. The report of the

case shows that the carriers had but two rates: one applicable to crude oil, and the other applicable to refined products of petroleum oil; the second being substantially higher than the first. The controversy was as to which of those rates was applicable. The Commission found that the material "was not what is commercially understood as a refined product of petroleum oil," and that the refined rate was not applicable and would be unreasonably high; and it prescribed as a basis to cover the unfinished product an intermediate rate based on a differential 2c per 100 pounds higher than the crude oil rate. In the course of its opinion the Commission observed the fact that there was no tradē name or commercial designation for the commodity, and directed the carriers to establish the new rates, giving the material involved such description as would not lend itself to misunderstanding or afford opportunities for misbilling (*Gov. Exhibit 99, Rec., pp. 1378-83*). In compliance with the order of the Commission in that case, the carriers established the rate on the basis ordered, giving the commodity the name "Unrefined Naphtha" (*Rec., pp. 567-574*). This defendant was in no wise interested in, nor had anything to do with, that case.

Following the establishment of this description and rates, the carriers in 1916 established rates on the same basis, *i. e.*, a differential 2c over the crude oil rate from Carterco, Oklahoma, to Baton Rouge, Louisiana, to cover a movement of tops between those points from the plant of the Carter Oil Company, using the description "Unfinished Naphtha" (*Rec., pp. 615, 618*). Upon the publication of these rates in this contiguous territory, the defendant requested the carrier to establish rates upon the same basis and description to cover its traffic between its shipping points. The carriers were requested to publish them northbound from Port Arthur (and Fort Worth, not here involved) to Kiefer to cover the blending naphtha shipped north, and southbound from Kiefer

to Port Arthur, covering the liquid condensate unblended, or blended only to the extent necessary to meet the shipping requirements and serve as a carrier of the liquid condensate (*Rec., pp. 559-566, 567-574*).

After the usual delay incident to such matter, the carriers published their tariffs on the differential basis sought, effective December 2, 1916. In doing so, however, they used the description "Unfinished Naphtha" northbound and "Unrefined Naphtha" southbound (*Rec., pp. 559-566, 567-574*). This difference was not made at defendant's request, and is an unimportant distinction (*Gov. Exhibit 98, Rec., pp. 694, 695, 1377*). It was testified by all the defendant's expert witnesses that the name "unrefined naphtha" was a strictly appropriate technical description of the material shipped southbound, and which is the subject of this indictment, and it was even conceded by the Government's own expert witnesses that the material involved is properly embraced within the generic name "naphtha," and it was admitted by them that it was in an unfinished state, requiring correction of its boiling points before it would become the material known and sold as "gasoline" (*Rec., pp. 885, 886, 888, 889*). The carriers at the time made no effort to ascertain the exact technical character of the material; the considerations moving them being that it was an unfinished material, and unfinished materials, under ordinary custom with them, being accorded lower rates than the unfinished product, and the fact that the Interstate Commerce Commission had established the 2c differential basis in the *National Refining Company case*, and that they had followed that basis on the Carterco-Baton Rouge movement (*Rec., pp. 567-574*). The Gypsy Oil Company notified the agent of the initial carrier that as soon as the tariffs became effective they would begin shipping the material theretofore described as "gasoline" under the description "unrefined naphtha" at the new rates; and this was done (*Rec., pp. 550-557*). The shipping

orders all bore upon their face a stamp indicating that there had been applied to the car a caution card required and permitted (by certain regulations of the Interstate Commerce Commission affecting safe transportation of explosive and inflammable articles) to be placed only upon cars containing this material (*Rec., p. 230*). It continued to be shipped upon this description and the rate applicable thereto for over two years, when agents of the Bureau of Criminal Prosecution of the Interstate Commerce Commission, conceiving that "gasoline" was a more appropriate description of the material than "unrefined naphtha" caused this prosecution to be instituted.

Doubtless upon the foregoing statement—every particle of which is supported by undisputed evidence—this court is curious as to why such a prosecution should have been instituted, in the first instance, and, in the second, how a conviction could have resulted. We can but speculate upon the answer; as to the first, that at the time the representatives of the Commission determined upon a prosecution, they were laboring under mistakes both of fact and of law. We say this as to the facts, because of a determined effort upon the part of the Government at the trial to prove that the material was not in fact blended at Port Arthur, but marketed as "gasoline," failing to prove which on the trial it shifted to a contention that blending is not a process of refining; in each of which respects the evidence clearly refutes these ideas (*Rec., pp. 588-91*). And as to the law, because of the erroneous interpretation thereof which they were then urging upon the Supreme Court in the *Lehigh Coal & Navigation case* (250 U. S. 556). And we think the conviction was possible only by reason of the improper admission and rejection of evidence and procedure assigned as error and hereinafter considered.

Upon the trial the Government made no effort in its direct case to prove by direct evidence that the material

in question was and in fact is gasoline. Instead, its proof consisted, first, in showing (on the theory of admissions) the fact (conceded by defendant) that previous to the establishment of the unrefined naphtha rates and also upon the shipments to Pittsburgh (to which point no unrefined naphtha rates were ever established) the material had been described as "gasoline." Included in this showing were those shipments during the early years of operation which were blended sufficiently to be sold commercially as "blended gasoline," and which the defendant conceded ought to have been, and was, shipped upon the gasoline rates. This evidence was all received over the earnest objection of defendant as to its admissibility on the ground that they did not constitute admissions, because the circumstances were vitally different in the most material respects, namely, that in the one case the material shipped was entirely different, and, in the other case, that there were no unrefined naphtha rates which could have been used. The second class of evidence offered by the Government consisted in the testimony of employees of casinghead plants not owned by defendant to the effect that they were accustomed to calling and shipping as "gasoline" the material produced at their plants; this (*1*) without any showing that the material shipped by them was similar in the degree of blend (a distinction which the defendant insists would be absolutely determinative of whether the material ought or ought not to be called "gasoline"); and, (*2*) in some cases, with a showing that the material was in fact of a different blend (even to such extent as that it ought to be called "gasoline"); and, (*3*) without any showing that there were any unrefined naphtha rates available; and, (*4*) in some cases, a showing that there were not any such rates available. This evidence was likewise admitted over the protest of the defendant. The third class of evidence (directed to the discrimination counts) offered by the Government consisted in evidence of shipments from casing-

head plants located at Jenks, Oklahoma, to Port Arthur, Texas, alleged to be of similar material to the Texas Company billed and described by the shippers as "gasoline," and upon which the Texas Company paid rates applicable to gasoline. The court declined to allow the defendant to show with respect to this evidence that the Texas Company had thereafter instituted suit then and now pending in the United States District Court in another jurisdiction, for the recovery of the difference between the unrefined naphtha rate and the gasoline rate upon the ground that the latter had been improperly applied. The fourth class of evidence consisted in a showing by the Government of certain lead pencil records in books kept by laboratory boys at Port Arthur, in which they had, up to about April, 1917, entered a record of tests of the material, describing it in some instances as "Kiefer Gasoline," in some instances as "Kiefer Gas," and in others as "Kiefer," which descriptions had been erased, down to the time in April, 1917, when they began to use the description (in these books) "Unrefined Naphtha." Also certain carbon copies of statements kept at the refinery, the originals of which were transmitted to the general office at Pittsburgh, upon which headings reading "Receipts of Kiefer Gasoline" had been cut off, for the months preceding June, 1917, subsequent to which these headings read "Unrefined Naphtha". This evidence was offered and permitted by the court to be introduced upon the theory of establishing intent. There was no showing as to when, where or by whom the erasures were made, other than that it was admitted by the defendant that they existed at the time the books were turned over to the Government upon the grand jury inquiry, nor any showing of when, where or by whom the headings of the statements had been cut off. But it was established that instructions had been given to all employees at the refinery, upon the establishment of the un-

refined naphtha rates, to thereafter so describe the material, and it was further shown that it was no part of the duty of the boys who made these entries to attempt to classify or describe the material, but simply to record the indicia of the physical tests of it, and it was also shown, as to the statements the headings upon which had been cut off the carbon copy remaining at the refinery, that the originals which were the actual record and on file in the main office at Pittsburgh were not mutilated, but bore the original headings. These statements were merely rendered for the purpose of intercompany accounting, having nothing to do with any classification of the material, and there was no showing whatever that the erasures or deletion were made by, at the instance, or with the knowledge or consent, of any person connected with the corporation within the scope of whose authority or employment freight rates or charges were in any wise concerned. The defendant, of course, objected strenuously to the introduction of this evidence upon the ground that it was not competent to show intent, and the further ground that evidence of intent was not admissible at the time on account of the *corpus delicti* not having been established by any competent evidence, under which circumstances its admission was highly prejudicial (*Rec., pp. 290, 300*).

To meet this case the defendant called six expert witnesses, some of them preeminent, upon the subject of the proper description of the material. They were, Colonel George A. Burrell, a man presently president of one refining corporation and general manager of another, neither in any way affiliated with the defendant, a consulting petroleum engineer, with the degree of Chemical Engineer and of Doctor of Science, who served for ten years in the Government Bureau of Mines, during four of which he was expressly engaged upon the study and investigation of this very gas and its recovery. During the World War, he entered the army and had complete charge of the Research Division of the Chemical War-

fare Service, having over 1500 of the most eminent technical men and scientists in the country engaged in such research under his direction; he was awarded a Distinguished Service Medal for this work. The Bureau of Mines, during his service with it, published and disseminated a bulletin prepared by him upon the subject of this industry, which is one of the exhibits in this case. He is also the author of a book on Gasoline, of technical papers upon the subject, the first man successfully to analyze the constituents of casinghead gas, and a man universally recoginzed as a preeminent authority on the subject. He was in no respect interested (*Rec., p. 689*). He testified that blending is a delicate expert art of refining, including the blending of this material (*Rec., pp. 689-691, 704, 705*); that the name "naphtha" in a strict technical sense defines the light distillates from crude oil down to kerosene, and that it is also the specific name of that subdivision of itself within certain gravities used for blending, which is also known as "painters' and varnish makers' naphtha" (*Rec., p. 691*). He defined "gasoline" as a mixture of hydrocarbons suitable for use in vaporizers, that is, such as motor cars, gasoline stoves, launches and lighting machines (*Rec., pp. 691, 692*). He testified further that there is great confusion in the nomenclature of the petroleum industry; that the material shipped by the Carter Oil Company from Carterco to Baton Rouge, known as "toppings", was a naphtha fraction, and that it was essentially similar to the product shipped to the defendant and utilized in the same way, namely, to make gasoline (*Rec., p. 692, 693*); that he himself sometimes called this material "gasoline", although he knew that that was not the proper name for it; that he even used that name in one of his bulletins published by the Bureau of Mines, but that he was very careful at the end of the book to state that that was not the proper name, that the material was not in fact gasoline, and that it could not be placed in that category until

properly prepared for market, and this bulletin was written in 1914 and published in 1915, long before any of the incidents the subject of this indictment occurred (*Rec., p. 694*); that "unrefined naphtha" is an entirely appropriate and accurate name, although he would have chosen "unfinished naphtha" in preference to "unrefined naphtha", but that one is as appropriate as the other (*Rec., pp. 694, 695*); that it is possible to blend the raw casing-head condensate to such an extent further than that to which the material here involved was blended, as would produce a product which could be used as gasoline, but that the product shipped to defendant—either the blended or the raw—was not usable to run a car; that he had taken samples of the material and made distillation tests upon it in order to be sure that it was of the same character as that shipped, and had tried it in both a Packard car and a Dodge car on the eve of the trial, and found that it absolutely would not run the cars, and that this was the result he expected by reason of his years of experience in the investigation and handling of the material, and that even during those years he had made experiments in attempting to use the material in a car, and found that it was necessary to "weather" it away until over 80% of it was lost, using only the 20% remaining to accomplish the purpose, which of course was not the same material as that shipped (*Rec., pp. 695-699*). He had had applications from other refiners to purchase the lighter ends of his topping plant, then under construction at New Orleans, and some of the applicants had called for the material under the name "unfinished naphtha" and other under the name "unrefined naphtha" (*Rec., p. 699*); that the material shipped to defendant could in no proper sense of the word be called "gasoline"; that it is all too volatile in character, vaporizes too readily, and has a loss on distillation around 15%, whereas any material to be reasonably regarded as gasoline should not have a loss over 5% (*Rec., pp. 699, 700, 702*);

that the scientific literature on the subject of naphtha used the name as applying to the lighter ends of crude oil above kerosene, as a generic term (*Rec., p. 700*); that so-called still-gas gasoline arising in a refinery is condensed, and handled and treated exactly the same as the liquid condensate of casinghead plants, and blended with heavier distillate in the same way that the material shipped is (*Rec., pp. 700, 701*); that the casinghead condensate occupies a reciprocal relation to the heavier naphtha, in that by their being blended together both are made usable and more useful (*Rec., p. 701*).

During the trial Colonel Burrell conducted a joint demonstration with the Government's experts, two cars being used, the defendant selecting a Packard car and the Government selecting a Pierce-Arrow car. They first filled the cars with the unblended liquid condensate, and attempted to drive from the town of Jenks to the town of Kiefer, a distance of about 12 miles, over a flat, non-hilly country, and under atmospheric conditions favorable to the use of the material. They started with the machines cold and in every way favorable to the material. The witness was in the Packard car, which ran about three-fourths of the way to Kiefer, where it stopped absolutely dead, and no amount of adjustment or persuasion could make it go. On the few light grades encountered the car lacked power; it puffed and wheezed and acted quite unnaturally, and it finally became necessary to abandon the car through inability to proceed further, after the Government's representative was given every opportunity to do anything he could to make it go (*Rec., pp. 797, 798*). They then tried the blended material, blended to the same extent as that shiped to Port Arthur, and attempted to run from Kiefer to Tulsa. They had so much difficulty in attempting to start the car that they were about to abandon it. He testified that he never witnessed a more unsatisfactory performance of a motor car. The road was

hilly, and the car did everything that a car with a good grade of gasoline should not do; it had no power on the hills, none of which were extraordinary, and on some it would creep to the top at a speed of 2 miles per hour on low, and on the level stretches there was no speed of consequence, and it behaved abominably. They finally got to within two or three miles of Tulsa, and it again came to a dead stop. After doing their utmost to start the car, it being then two o'clock in the morning, it was finally found necessary to abandon the test and fill the car with real gasoline. They were between two and a half and three hours trying to run 12 miles. There was nothing the matter with the car, and as soon as the real gasoline was put in it had no difficulty whatever in running. On this test the atmospheric conditions were still more favorable. In the opinion of the witness, the material used would not have run the car as little as it did under less favorable conditions. The cars were public hired cars, driven by their regular drivers. Every thing was done under the immediate observation of, and every opportunity afforded, the Government experts to try to make it operate (*Rec., pp. 798-800*).

The Government made no attempt to put on the stand any of its witnesses who accompanied the Packard car on this test, but, in order to excuse doing so, waived their previous claim that one of the witnesses they sent for the express purpose of witnessing the test was an expert (*Rec., p. 804*).

Dr. James B. Garner followed Colonel Burrell as an expert for the defendant. He is a chemical engineer and since 1915 has been Senior Fellow of the Mellon Institute of Industrial Research (University of Pittsburgh) in charge of the Natural Gas Investigation; has been engaged since 1897 in teaching chemistry and doing consulting industrial chemical work; has made a special study of and been engaged upon research in connection with casinghead gas; is thoroughly familiar with the

scientific literature on the subject (*Rec., pp. 708-710*). It defines naphtha, in its generic application, as that liquid distillate derived from crude petroleum, lower in boiling point than ordinary kerosene, and in its specific application as that subdivision of the naphtha fraction known as painters' naphtha or solvent naphtha. He defined gasoline in its proper technical sense as the low boiling portion of naphtha having a gravity of 76 to 82, and usable for vaporization purposes; that as a commercial term or article of commerce it is a finished product as distinguished from an unfinished product, and that nothing could be properly called gasoline which could not be used for vaporization purposes, such as running a car or gasoline stove; that he is familiar with the product shipped to defendant, and that it was in no proper sense of the word gasoline; further, that the term "unrefined naphtha" is not only an appropriate description but a very accurate description of the product (*Rec., pp. 710, 711*). He participated in the tests made on the eve of the trial, as to which Colonel Burrell testified, and corroborated Colonel Burrell's testimony. He testified that 96% of all the materials used and called "gasoline" is used in internal combustion engines with suction carburetors; that the material called "cracked gasoline" is not gasoline at all, because it is an unrefined material; that, dependent upon its characteristics, it might be unrefined naphtha (*Rec., p. 712*); that casinghead gasoline of the same gravity as gasoline would still not be gasoline, but fundamentally different, which would be demonstrated by plotting curves of the distillation tests of the two materials; that they vary in the relative amounts of pentane, hexane, heptane, octane, nonane, protane, butane and essobutane (*Rec., pp. 713, 714*). He produced a chart (*Deft's. Ex. 149*) showing the difference in curves upon distillation tests even as between Jenks and Kiefer material. He testified that casinghead gasoline is not refined because it is not fit

for use as gasoline in the broad sense of the public understanding of the word "gasoline" (*Rec., p. 715*). He made distillation tests of the material used in the experiments conducted jointly with Government experts, and gave it as his opinion that the material was unrefined naphtha and not gasoline (*Rec., pp. 843-846*). He also accompanied Colonel Burrell in the Packard car in which the joint test was made, and testified that when the car went "dead" between Jenks and Kiefer they got some material called drip, being a heavier material, and tried mixing it in an effort to start the car, which it still would not do, although more of the material was added. He gave it as his opinion, based upon his knowledge of the literature on the subject and his experience, that the reason the material shipped was called "casinghead gasoline" was that it took the name "casinghead" from the fact of its being derived from the casinghead of an oil well, and the name "gasoline" because it could be made into gasoline (*Rec., p. 848*). So far as the material used in the test operated at all, the car consumed about a gallon to four miles, more than double the reasonable consumption of gasoline (*Rec., p. 849*). Even if the material would run a Pierce-Arrow car, that would not indicate that the material was gasoline, partly because of the construction of a Pierce-Arrow car, and for the further reason that he had known crude oil to actually run a car (*Rec., pp. 850, 851*).

The next expert called by the defendant was Dr. Eugene Paul Schoch, a professor, and chairman of the School of Chemistry and Chemical Engineering and head of the Division of Chemistry of the Bureau of Economic Geology of the University of Texas, with which he has been connected since 1897. The chief study of chemical engineering in the University is technology of petroleum, on account of the fact that petroleum ranks foremost in the chemical industries of the state, and the University's policy is to give special aid to

state industries; they not only have a laboratory, but they also have a small refinery. He is a member of many technical societies, and one of the prime requisites of his work is to keep abreast of current technical literature on the subject of petroleum. He is the author of a score of papers on scientific subjects. His research work embraces the casinghead industry (*Rec., pp. 717, 718*). He testified that the name "gasoline" has always been applied to material suitable for vaporizing. Although the material now called gasoline would have been called naphtha twenty years ago, yet it has always been a material suitable for vaporization, such as stoves, automobiles, gasoline torches used by plumbers, and so on (*Rec., pp. 718-720*). He pointed out why it is necessary that a material to vaporize properly must be composed of certain proportions as distinguished from any mixture of the constituents (*Rec., p. 720*). He testified that "naphtha" is the proper technical name to cover collectively the lighter portions of crude oil; that gasoline is a naphtha of certain properties embraced within the term "naphtha"; that name is a proper name for any gasoline, but all naphthas are not necessarily gasoline (*Rec., pp. 720, 721*). He is familiar with the material shipped to Port Arthur, and that it is not gasoline; that the name "unrefined naphtha" appropriately describes it (*Rec., p. 721*). He participated with Colonel Burrell and Dr. Garner in the distillation tests, and also in the test made by the defendant's experts on the eve of the trial. He knows from the distillation tests that the material used was the same as that shipped (*Rec., p. 721*). He corroborated the testimony of both Colonel Burrell and Dr. Garner that the material absolutely would not run either the Packard or the Dodge car upon which it was tried (*Rec., p. 722*). The court refused to allow the defendant to introduce by him a statute of Texas which absolutely prohibits and makes criminal the calling of this material either gasoline,

or gasoline in combination with any other word—which would of course include casinghead gasoline (*Rec., pp. 720-727*). This witness also qualified as an expert in the art of refining. He testified that blending is an essential operation in the production of at least two, and probably more, commodities obtained from a petroleum refinery; that it is an essential operation in refining gasoline, including the utilization of still gas, casinghead gas, and cracked material (*Rec., p. 727*); that the proportions of the more volatile to less volatile in gasoline is a very important and very intricate matter; that the way it is done is, that, being governed by the materials on hand, a mixture is made by guess, then a distillation and such other tests as are necessary made of the mixture to determine when it has fulfilled requirements (*Rec., p. 728*); that the term "unrefined naphtha" comprehends more than the material shipped, and is not limited to it alone, but embraces tops from a topping plant, or light-end distillate (*Rec., p. 728*). He gave specifications of material which would be gasoline, as determined by fractional distillation, the same as the War Department specifications (*Rec., p. 730*). Instead of having an initial boiling point of 140 degrees, as it should have had, the material tested began to distill at 85 degrees and its end point was 400 degrees (*Rec., p. 732*).

The defendant next called as an expert Mr. Walter Miller, a petroleum refiner and consulting engineer with reference to petroleum refining, of Tulsa, Oklahoma. Before coming to Oklahoma he had been employed by the Tide Water Oil Company at Bayonne, New Jersey, where among his duties were experimental and research work and charge of the gasoline and kerosene department, and at the time of leaving was a member of the Manufacturing Committee, chairman of the Investigation and Research Committee, chairman of the Process-

ing Committee, assistant to the superintendent in charge of all processing work in the refinery, etc. Following that, he was general superintendent of the refineries of the Pierce Oil Corporation located in the United States. He then became manager of the Manufacturing Department and in complete charge of all the refining operations of Cosden & Company, and is still connected with that company in a consulting capacity. In connection with his work he has studied technical works, both upon chemistry and civil and mechanical engineering applied to refining and the technology of petroleum refining generally, and in the course of his work has had many opportunities to visit the plants and meet other refiners and discuss evolution of the business. He is a member of several technical societies (*Rec., pp. 735, 736*). It has been a part of his duty in connection with his employments to decide what names should be applied to different products and apply names to new products or new divisions of old products. He has handled millions of gallons of casinghead products, and he is familiar with the analogous condensate produced from still gas. He has built compression plants in refineries for the recovery of still gas (*Rec., pp. 735, 736*). He testified that the material shipped is not finished gasoline (*Rec., p. 737*); that it is practically the same and goes to the same use as the still-gas condensate, which also has to be blended or weathered or redistilled in some manner the same as the casinghead condensate does (*Rec., pp. 737, 738*). The casinghead condensate is not gasoline and not suitable for gasoline. He defined gasoline as that fraction of crude petroleum or similar products lying within the range of boiling points and other necessary physical tests which will satisfactorily and economically operate an internal combustion motor. This material will not do that. It is necessary to apply further processes to it before it will. These processes are generally

done in a refinery by blending with products of crude oil in such a manner and such proportions as to bring the material to the point where it will operate an internal combustion motor satisfactorily and economically (*Rec., p. 738*). That is the most economical method of doing it. It can be brought to a stage where it will operate by excessive weathering or distillation; and it is sometimes necessary to treat it with acids or filter it through fuller's earth, after which it is still necessary to blend it (*Rec., pp. 738, 739*). To weather it to such point to make it reasonably usable would result in a loss of all but 25% to 40% of the product. It is his practice with respect to blending to use 3% to 5% of casinghead condensate with other materials; this in order to procure a proper recovery and proper range of boiling points and intermediate curve points and to prevent excessive loss by evaporation (*Rec., p. 739*). Few if any other refiners go above 10% of casinghead content (*Rec., p. 740*). Naptha, as used in the refining business, he defines as a generic term applicable to that fraction obtained by the distillation of crude oil before the product kerosene is reached, and specifically as covering the heavier blending materials which are used in compression plants. It was the custom of the Tide Water Oil Company to call the material, both in process of manufacture and when completed, naptha, even including the material commonly called gasoline which was sold by them under the name "naptha". This is a very old concern and always used that term (*Rec., pp. 740, 741*). The blending done by defendant at Port Arthur is a process of refining; that the name "unrefined naptha" is a proper designation of the material shipped to Port Arthur, although he might prefer to call it "unfinished naptha" or "unfinished gasoline blend", or "unfinished casinghead blend", or "unrefined casinghead blend". The term "unrefined naptha" embraces not only this ma-

terial but any naptha product which has not been completely refined ready for use, including tops and light-end distillate, and is a more appropriate name for those materials than tops and light-end distillate (*Rec., p. 741*). It would not be practicable in this day and age for a refinery producing gasoline to operate successfully without resorting to blending as a part of its process. There is great confusion among refiners in the use of names of products, which includes applying the names of finished products to the materials ultimately to become such products (*Rec., pp. 741, 742*). Blending at a refinery is a sort of compounding. He has known of casinghead plants which attempted to blend in the field and sell the product as a finished product, but had found it unsatisfactory. The blending which is done at a casinghead plant is a much simpler operation than the blending done at a refinery. The only object at the plant being to reduce the vapor tension to the shipable degree, whereas in the refinery the object is to reduce not only the vapor tension but other undesirable characteristics to such an extent as to make a product for use in automobile motors (*Rec., p. 743*). It is not practicable to blend at a casinghead plant in order to make a finished marketable product, because it would require not only the heavy naptha used to blend for shipping purposes but also a large portion of the straight run products from crude oil to give a satisfactory distillation test and performance. A satisfactory blend is one where the casinghead is held down to not over 5%, and that would mean that the casinghead plant would have to have 90% to 95% of other products available, which would be obviously impracticable and uneconomical, as otherwise it would be necessary to locate the refinery at the casinghead plant, and as wells were exhausted move the refinery around from time to time (*Rec., p. 746*). There is a much higher degree of skill and knowledge incident

to the blending done at a refinery than that done at a casinghead plant. Blending at a casinghead plant merely consists in blending sufficient to reduce the vapor tension, whereas in a refinery it includes the problem of blending for different percentages off on distillation tests, for the end point, for the initial, for the gravity, and anywhere from 5 to 14 points, and requires considerable experience and an intimate knowledge of the product being blended, and the proportions are usually determined by skilled chemists or men with long experience in the refining business (*Rec., p. 747*).

The next expert called by the defendant was Dr. R. F. Bacon, Director of the Department of Industrial Research of the Mellon Institute of Pittsburgh (University of Pittsburgh) since 1914; a doctor of chemistry, and with two honorary doctor degrees; was connected with the Government for six years, and has been with the University of Pittsburgh since 1911, engaged in the study of petroleum. He is the author of a number of technical papers on the subject of petroleum, and coauthor with Mr. Hammer of an important and comprehensive two-volume work entitled "American Petroleum Industry." He was a colonel on General Pershing's staff in France, and had charge of all the chemical work of our army in France up to the time of the armistice. He is a member of any number of technical societies, including international societies of the greatest importance. He was cited by General Pershing for his work in France. He is the author of numerous papers and scientific journals, and the holder of a number of patents in the field of chemical industry. His business and study necessarily keeps him abreast of the scientific literature relating to the subject of the petroleum industry (*Rec., pp. 748-750*). He has made a large number of tests, both physical and chemical, and is familiar with the material shipped to Port Arthur. His definition of gasoline is

that it is a finished product that will satisfactorily run a motor car (*Rec., p. 750*); that while there was considerable confusion in names and a practice general among refiners of calling unfinished material by the name applicable to the finished product, the name "gasoline" could not properly be applied to anything but a finished product such as would satisfactorily run a car (*Rec., pp. 749-752*). In the Mellon Institute they have a machine for testing materials by their performance in a gasoline engine; and the witness has made many tests. With each such performance test they make a distillation test, and plot the curves, and it is by this means they know the curve of a material which is a satisfactory gasoline. They are thus able to determine by the distillation test of a material whether or not it is a satisfactory gasoline. In other words, the curves are an index to performance (*Rec., pp. 758, 759*). He has tested casinghead gasoline and found it would not run an engine at all. Sometimes he would find one that would run in a very unsatisfactory manner. It would deliver little power, and the consumption would be very high, and it would spit and miss fire (*Rec., p. 760*). It is possible by means of these curves to tell whether or not it is a material that will not run a car. There is a point in between as to which it will be difficult to say, but it is possible to tell whether a material will run a car in a satisfactory manner (*Rec., p. 760*). A material that will perform satisfactorily as gasoline must have a comparatively small amount of volatile constituents and a moderate amount of intermediate and end constituents. Exhibit 140 shows two curves, one of which will not operate at all and the other very poorly (*Rec., pp. 761, 762*). These curves were made from distillation tests of the material shipped from Kiefer and Jenks.

Dr. Bacon also participated with Colonel Burrell, Dr. Garner and Dr. Schock in the experiment that was

made by the defense experts on the eve of the trial. The distillation tests indicated that the material was not a usable gasoline. His observation of the experiment was the same as that testified to by the other witnesses, that is, that the cars refused to perform altogether (*Rec., pp. 762-764*). The material is not gasoline. The name "unrefined naphtha" is a proper designation, although not the most descriptive one he could think of. That name comprehends more than casinghead, and is a broad term. It comprehends any naphtha that has not been brought to a finished state. Naphtha, as applied to the petroleum business, is a term covering any low boiling point product of petroleum which boils below the kerosene oil fraction. It would embrace gasoline (*Rec., p. 764*). There is no question that blending as applied to gasoline is a part of the art of refining, and that it has greatly increased the available supply of gasoline by making usable for the purpose of manufacturing gasoline a much wider cut of naphtha than could otherwise be used (*Rec., pp. 764, 765*). It has also made a market for the casinghead product, for which there would otherwise be little or no market (*Rec., p. 765*). Casinghead could be weathered down to a point where it would run a motor car in a very satisfactory way, but the loss would be very large, and it would not be profitable (*Rec., p. 765*). The blending of naphtha and casinghead does not necessarily make gasoline. If it is blended in such a way as to meet specifications, or in such a way as to run a motor car, it may be gasoline; if not, it is not (*Rec., pp. 768, 769*). The word "casinghead-gasoline" is a compound word, and the material is different from the type of material commonly called "gasoline." A material is not refined until it reaches or is brought up to a standard. As an illustration, sulphur, although it may be 99.7% pure, is still crude sulphur, and is sold and shipped as such because it does not meet the standard for refined sulphur.

Copper, although 99% pure, is sold as base or ana copper; the question of whether it is refined or unrefined being determined by market standard (*Rec., pp. 770, 771*). "Casinghead-gasoline" is a compound word, and the inclusion of gasoline in it no more imports gasoline than does German-silver silver, or quicksilver silver, or isinglass glass (*Rec., pp. 770, 771*).

This witness also participated in the joint test that was made with Government experts during the course of the trial, he being in the Pierce-Arrow car. The car was cold when it started, and it ran apparently satisfactorily the first six or seven miles, then the engine began to have trouble; first it began to lack power, began to miss, and was evidently in trouble, and this trouble continued until about eight miles had been traveled, when the car stopped and the driver could not start it. It took twelve minutes before they were able to get the car started again, and during the first half mile the engine was still in trouble, threatening to stop, then picked up and ran very well until it got to within a hundred yards of Kiefer, when it stopped again, and it took five minutes to get it started again. With the Kiefer material in the Pierce-Arrow car, it was able to run all the way to Tulsa without stopping, and while it ran fairly satisfactorily, it popped a few times, and there was one hill in particular on which it performed badly, almost stopping, the driver having to throw it into second, going only six or seven miles an hour until it got to the top of the hill. It was necessary for the driver to manipulate the air. The witness has seen crude oil operate a car more satisfactorily than this material did (*Rec., pp. 804, 805*). The temperature was 54 when they left Kiefer and 46 when they got to Tulsa, and in the opinion of the witness it was due to this difference in temperature alone that it was possible to run the car as much as was done, and that the results would probably have been similar to what they were on the first test had the

atmospheric conditions been the same. After the joint test, the witness was positive the material was not gasoline.

All of the foregoing experts were in no way connected with the defendant.

In addition, the defendant called Mr. George H. Taber as an expert. He is vice-president in charge of the refineries and all manufacturing of the defendant. He has been engaged in the petroleum business since 1882, having been superintendent of the plants of several other companies before coming to the defendant in 1893. He had charge of the construction of the casinghead plants from the beginning, and also of operation (*Rec., pp. 667, 668*). During the 38 years of his experience, he has given particular attention to a study of the nomenclature of the industry, which interested him more than any other part of the business. In his earliest employment it was a part of his duty to review the nomenclature used, and he originated much of it. With other companies with which he was connected he rearranged the nomenclature of the oils, giving new names to the old and names to new oils, that is, ones which had not theretofore been manufactured. He has read practically all the literature on the subject he could find, including technical books on the subject of manufacture and use, and treatises on the apparatus in the use, manufacture and test of petroleum and its products, also current trade papers, government publications, bulletins of technical societies. In 1915 he read and criticised for Dr. Bacon the work of Bacon & Hammer known as "American Petroleum Industry," which is today considered the most comprehensive and best work on the subject of petroleum (*Rec., p. 670*). His aid in this respect was acknowledged in the preface. This work covers the entire range, from the geological part of the production to the shipping of the finished product, and to some ex-

tent their uses. In 1917 he revised the manuscript of a proposed text-book on the manufacture of petroleum for the International Correspondence School. He has recently reviewed the manuscript of a forthcoming work by Hammer & Padgett on the evaluation of petroleum and natural gas. He has written many papers on the subject. He is a member of technical societies, which bring him in contact with a wide range of subjects pertaining to the petroleum industry (*Rec., pp. 670, 671*). The ordinary way of refining crude oil is to charge it into a still over a furnace, the fire from which boils the oil in the still and it passes over as a vapor, which in turn passes through tubes submerged in water, which condenses the vapor into liquid. Crude oil is a substance made up of a large number of different liquids, and when it is boiled the first vapor coming over partakes principally of the lighter portions of oils, and as the heat rises the product that comes over is heavier in weight and darker in color and has more body. From the beginning of the business it was customary to call all that portion of the vapor down to the point of the material used for kerosene "naphtha", and that is the generic or family name (*Rec., p. 671*). This crude naphtha product was divided up to suit the demands of customers, which division was generally made in a steam still, which made possible a better separation than the fire still. He quoted from Peckham's census report of 1885 showing that from crude oil about 15% naphtha was produced, but about a half of one per cent was made into gasoline, the balance of the naphtha fraction being what is specifically called naphtha. "Naphtha" is the strict technical name of all the lighter oils above kerosene, and is so used in all the authoritative literature, including government publications. The gasoline of the early days was used to make gas in Springfield gas machines, and that is where it got its name. This was for years the only thing that

was called gasoline (*Rec., p. 672*). With the advent of automobiles, there was not sufficient of this material then called "gasoline" to supply the demand, and it was necessary to go deeper into the naphtha to get a heavier material, but they called this gasoline also. As automobiles increased in number, it was necessary for the manufacturers to make the carburetors so that they would burn heavier material, until now practically the entire range covered by naphtha is called "gasoline", and to some extent some kerosene is put in. Some people call the material used in cars benzine, others naphtha, others gasoline, and others gas. The refiner has to differentiate the materials in order to know what is really desired. The same material the automobilist uses and calls gasoline is called naphtha when used for a launch (*Rec., pp. 672, 673*). The demand for gasoline has caused the invention of what is known as the cracking process, which consists in the destructive distillation which results in breaking up the heavier oil into lighter oil (*Rec., p. 674*). Naphtha has other sources of origin than petroleum oil. It is made from coal tar products, and there is a naphtha which comes from shale, as well as the naphtha from natural gas or casinghead gas. It is extracted from casinghead gas by a process known as the absorption process, as well as the compression process. This absorption process is a patented process, under a patent issued to George M. Sayboldt, of Bayonne, New Jersey, who is a man of international reputation of forty-three years' experience in the business; the inventor of a tester and viscosimeter; he is also the inventor of the Sayboldt chromometer, also called a colorimeter, which is the machine used for determining the color of oils (*Rec., p. 675*). The process used for extracting the naphtha from casinghead gas by the Gypsy Oil Company is a compression process (*Rec., p. 676*). It is not known scientifically whether the casinghead gas is

a part of petroleum or not. One theory is that it comes from rock strata where crude oil comes from, and others think it is distilled off from crude oil in the ground (*Rec., p. 676*). That portion of crude oil which comes off before kerosene in the course of stillation is known as the "naphtha fraction" (*Rec., pp. 676, 677*). A gas comes off incident to refining which is compressed and condensed in the same manner as the casinghead gas. It is precisely the same material as the casinghead product, and is a material that is used for blending to make gasoline (*Rec., p. 677*). Gasoline, in a strict technical sense, is a refined distillate from petroleum of about 76° to 80° gravity, which is suitable for use in carbureting air for making a gas suitable for burning in private dwellings. Gasoline, as an article of commerce, embraces not only this, but is a combination of products of naphtha produced from crude oil, natural gas, casinghead gas, and other sources, which are made suitable for use in the general run of automobiles which use suction carburetors. It has to be suitable for such use, not a material that will run one make of car but any make of car with an ordinary suction carburetor (*Rec., p. 678*). The material shipped to Port Arthur is not gasoline; it is unrefined naphtha, because it requires refining to fit it for the market (*Rec., p. 678*). It is possible and some people do attempt to blend the casinghead condensate with heavier materials at the casinghead plants and market it as gasoline. The material shipped to Port Arthur, however, is not so blended, but is merely blended sufficiently to make it shipable and prevent loss in shipping (*Rec., pp. 678-680*). Refining, as used in the petroleum business, embraces not merely purifying, but blending and all other processes necessary to bring the material to a given standard and place it in marketable condition. Silver may be refined in the same manner (*Rec., pp. 680, 681*). The casinghead material has too

much light end in it to be of permanent character or to be used in suction carburetors, and too much light end for safety or economical use (*Rec., p. 682*). An ordinary specification for gasoline is that there must be a recovery of 95%, while the material shipped to Port Arthur will recover but 80% to 85% on distillaton (*Rec., p. 682*). The liquid condensate, when dealt in as an article of commerce, is commonly sold to refiners for blending under a multiplicity of names, including "casinghead naphtha," "casinghead gasoline," "raw casinghead," "wild casinghead," "kerosene blend," "naphtha blend," and others (*Rec., p. 683*). "Unrefined naphtha" is a perfectly proper designation for it, and is a satisfactory name, while "gasoline" is not. The reason for shipping the material to Port Arthur is to make it marketable (*Rec., p. 684*).

Mr. Taber gave reference to a large number of technical works which supported his definitions of "naphtha" (*Rec., p. 773*). These works embraced scientific works by the most noted authors on the subject, and include government publications and government patents (*Rec., pp. 776-782*), including the Sayboldt patent, which is described as "obtaining naphtha from natural gas" (*Rec., p. 779*). A technical paper, No. 74, issued by the Bureau of Mines in 1914, uses the term "unrefined naphtha," and gives it the same definition the witness does. Bacon & Hammer, in "American Petroleum Industry" (Bacon being Dr. Bacon, the witness whose testimony precedes this), also mentions "unrefined naphtha," and gives a definition of it that comprehends casinghead. It is the same definition as the Bureau of Mines' publication gives, namely, "those fractions that boil in a temperature up to 150 degrees centigrade equal to 102 degrees Fahrenheit atmospheric pressure," within which range of boiling points the casinghead product is embraced (*Rec., p. 783*).

After the defendant had closed its case with those witnesses the court permitted the Government, over objection, in effect to reopen its direct case and put on two expert witnesses: one, Dr. Edwin DeBarr, vice-president of the Oklahoma State University and head of the Department of Chemistry thereof, with degrees from the University of Michigan, and professor of the state college since 1892, who testified that he had several years previously made an investigation, in the neighborhood of Bartlesville, of petroleum products; had tested out several plants, particularly cracking plants, and obtained considerable data in visiting absorption plants and refineries in the State of Oklahoma; that he had also investigated an explosion of casinghead gasoline at Ardmore; that he had made laboratory experiments and investigations of gases from various oil wells and oil from the gases from the Blackwell, Cushing and Glenpool fields of Oklahoma (*Rec., pp. 878-9*). He testified that the product of compression plants is "casinghead gasoline"; that other kinds of gasoline are motor gasoline, casinghead gasoline, gas machine gasoline, cleaner's gasoline and many varieties, depending upon the purpose for which it is to be used; that casinghead gasoline is not properly denominated as unrefined naphtha because it is in most cases a pure, refined product; that its natural condition in the earth is refined; that the blending of it with naphtha which had been through "the usual three refinery processes" would not produce unrefined naphtha because both the products put together are refined, and that putting two refined products together is not a process of refining but simply a blending process (*Rec., pp. 879-80*); that it would not be possible by further blending to produce gasoline; that casinghead gas is produced by a natural distillation process in the earth; that the fact that a particular gasoline was too volatile for economical uses in an automobile would not justify

calling it something else; that casinghead gasoline, while having practically the same chemical properties as refinery gasoline, has them in different proportions; that even though the product of a casinghead plant should show a recovery of but 88 on distillation, he would still call it gasoline, and that even though the product failed to meet specifications of customers for gasoline, it would not justify calling the material some other name, but that it would still be gasoline (*Rec., p. 880*); that he knows of no scientific literature which refers to it as unrefined naphtha, though he has read extensively on the subject, nor has he ever seen it so denominated in trade journals. The only place he knows of which refers to it is the work of Bacon and Hammer (testified to by Mr. Tabor) and that does not describe casinghead gasoline as unrefined naphtha (*Rec., pp. 881-2*); that during certain investigations he ran a Paige car part of the time on a mixture of compression and absorption product and in another case on a certain compression product, and drove a Ford car several hundred miles on a certain compression gasoline (*Rec., p. 882*). This testimony was received over objection because of failure to identify the particular kind of compression gasoline used as similar to that produced (*Rec., p. 882*). He admitted that the material was not suitable for "the common people to use" in a machine and would need to be regulated in its volatility for general use, although for a man like him it need not be regulated. The general public needs protection against its use, and he would not allow his wife to run it alone even if she had learned how to use it (*Rec., p. 883*); that before the material is usable as gas machine gasoline, it would be better to have an acid treatment, and this product sells for double the price of the casinghead product and requires a great deal of care in making (*Rec., p. 884*); that certain of the boiling points are a very substantial element as to whether the

material is usable; that when the initial boiling point is below 90 it will not start an ordinary car; it is hard to use it in a Buick but that some cars can be started by putting a few drops of gasoline in the pet cocks (*Rec., p. 884*). The court would not permit him, on cross examination, to testify that taxes and inspection by the Corporation Commission of the state are not extended to this material as gasoline (*Rec., p. 885*). In his direct examination he used the word refined as synonymous with pure. It was sufficiently pure for the purposes, but although a material might be pure it is also necessary in the manufacture of gasoline to correct its boiling points, which is frequently done at a refinery (*Rec., p. 885*); that he has known casinghead to be blended into crude; that if the material was blended into crude, even though both it and the crude were pure, it would still be necessary to refine it in order to produce gasoline (*Rec., pp. 885-6*). In the casinghead product there are undesirable materials which ought to be disposed of in order to make an economical motor fuel, but not necessarily to make it usuable. This is one of the corrections of boiling points of casinghead material accomplished when it is sent to a refinery and one of the objects of sending it to a refinery. For general purposes the boiling points of casinghead are not proper boiling points for economical motor gasoline fuel (*Rec., p. 886*). The difference in proportions of the constituents as between casinghead and straight refinery gasoline is the same distinction that determines all the naphtha products, there being a preponderance of heavier naphtha fractions in naphtha with a preponderance of lighter ends in refinery gasoline, although what was naphtha a few years ago is entirely different from what is naphtha today or even what might be called unrefined naphtha, the kerosene beginning much lower down (*Rec., p. 887*). In casinghead, the lighter hydrocarbons are in larger proportion and the heavier in les-

ser proportion than in straight-run (refinery) gasoline (*Rec., p. 887*). He has seen the name casinghead naphtha applied to the material in patents but was ignorant of the fact that the Interstate Commerce Commission's safe transportation regulations used it. It is a name coined in the last year or two (*Rec., p. 888*). Naphtha is a proper designation of the lighter hydrocarbons and generally so used by writers. There is much interchangeability between the names naphtha and gasoline and extreme confusion, and it is quite generally true that people miscall the constituents of petroleum by the name of the finished product (*Rec., p. 888*).

There could be such a preponderance of lighter hydrocarbons in the casinghead product as that it would not run a car. His recollection of Bacon and Hammer's definition of unrefined naphtha was that it comprised those naphtha fractions boiling up to 150 centigrade, and that from the testimony he heard of the material involved, it would come within that definition, and he has seen other casinghead gasoline which would (*Rec., p. 889*); but while he calls it gasoline, many writers embrace it within the naphtha fractions (*Rec., pp. 889-90*); that there is a difference of opinion whether the casinghead gas comes from petroleum oil or not, though he is not familiar with the decisions of the State of Oklahoma on the subject (*Rec., p. 890*). He distinguishes this material from gasoline by designating it with the special prefix casinghead (*Rec., p. 890*). He uses gasoline as a generic term, using it in the plural and, when desiring to specify particularly, uses a prefix and would embrace in that use a material, though slightly unfinished, but not if unfinished for the purpose for which it was to be used (*Rec., pp. 891-2*). If the material has achieved that degree of finish to be used for gasoline, he would embrace it within the definition of gasoline (*Rec., p. 892*). He understands that refiners are accustomed to using the term "refined" as applicable to the products produced

by their refinery, and the same is true of his reading and observation, and it applies to a finished marketable product that has been finished at a refinery or some collateral plant (*Rec., p. 892*).

The other expert called by the Government was Dr. W. P. Dykema, a consulting petroleum engineer, a graduate of the Michigan College of Mines in 1905, from which year until 1909 he followed mining engineering, and then for two years did consulting work in the oil field of California, surveying and general engineering, and from 1911 to 1914 was again engaged in silver and copper mining. Following that he was a year with the city engineer's office in Los Angeles, and from 1915 to 1920 was with the United States Bureau of Mines, which he had just left to engage in consulting work. During the time he was with the government he specialized on natural gas gasoline work, including casinghead, during three years being located at San Francisco and the other two at the Bartlesville, Oklahoma, petroleum experiment station, of which he was petroleum engineer the first year and superintendent the second year (*Rec., pp. 822-3*). He has made experiments and examinations in Pennsylvania, West Virginia, California, Oklahoma and Louisiana fields. He wrote Bulletin 151, and Bulletin 176 Division of Petroleum Technology and was a coauthor of Technical Paper 232 issued by the Bureau of Mines. Bulletin 151 deals with compression and 176 with absorption methods, and 232 with the extraction of gasoline from residue gas from compression plants by absorption process. The bulletins have been widely circulated by the Bureau of Mines (*Rec., p. 824*). After this witness had heard the defendant's expert witnesses testify he undertook to make an experiment during the trial (unaccompanied by anyone on behalf of the defendant) as to whether or not a certain material produced from another plant at Jenks would run a Packard car. Notwithstanding the fact that on preliminary cross

examination he was unable to say whether he had drained the reserve tank of the car used, of the real gasoline before attempting the experiment, he was allowed to testify, over objection, that he filled the tank of the car with casinghead product and ran it in from Jenks to Tulsa without any difficulty whatever (*Rec., pp. 824-28*). Although this testimony was ultimately ordered stricken from the record by the court, it was only after the defendant was able to and did locate and produce the driver, and find and prove that the actual fact was that the reserve tank of the car had not been drained, and that it had consequently been run on the real gasoline instead of, as testified by the witness, on the casinghead product (*Rec., pp. 892-896*). This witness also participated on behalf of the Government in the joint experiment conducted during the trial and was in the Pierce-Arrow car. He admitted that the Pierce car, after starting out without difficulty, stalled at a point about seven miles beyond Jenks, and after relieving the pressure and cooling the engine somewhat they were able to start again and get to within about one hundred yards of the Kiefer plant, when it was again necessary to relieve the pressure and get the engine in shape before it could drive in. He believed if the carburetor had been adjusted the car would have run steadily on the material (*Rec., pp. 828-9*). At the Kiefer plant ten gallons of the blended material was taken, and he testified the car drove into Tulsa without any trouble, leaving Kiefer at 12:20 and arriving in Tulsa at 1:03, a distance of nineteen or twenty miles, at a maximum speed of thirty-five miles an hour, and that in his opinion an even lighter material would have run the car, and that it was his belief that any liquid made from natural gas by compression, of whatsoever gravity, would run an automobile (*Rec., pp. 830-2*). He has experimented in running a Dodge car with 105 gravity gasoline, and he said "the naphtha" was most satisfactory and he could see no reason why

even the lightest product, methane, would not be a good motor fuel (*Rec., p. 832*); that in his opinion the material used in the test was gasoline (*Rec., p. 832*). He does not consider the extraction of the condensate by compression of casinghead gas a refining process, but considers it a process of manufacture, a separation, and in his opinion the material is a refined product because it needs no purification (*Rec., pp. 833-4*). It is his view that the material requires no refining after it is in a liquid state. The process underground, by which it is assumed the casinghead gas comes off the oil, is similar to the process involved in refining oil in a still, that is, as heat is applied to the oil the temperature rises and the various liquids come off in the order of boiling points, and in the earth the oil is under pressure which raises the boiling points, and after they are released practically the same thing happens as the various boiling points are reached (*Rec., pp. 837-8*). The vapor rising from a crude still is very similar to the vapor coming from a well, and they are both condensed into a liquid which is the same, and for this reason, in his opinion, what transpires under the earth is a refining process, and the material is therefore a refined product (*Rec., pp. 838-9*).

Gasoline is used for heating, lighting and cleaning purposes. In his opinion, the fact that the product of compression of natural gas would be too high in gravity for ordinary commercial use would not make it anything other than gasoline (*Rec., pp. 839-40*). He testified that the liquid was commonly known in the trade and in the scientific world as gasoline, and he had never heard it called unrefined naphtha prior to the beginning of this suit, and that in his opinion that is not an appropriate name because it is misleading in the respect that it would need further refining and further purification which, in the majority of cases, it does not, though in some instances where there is lots of sulphur it must be refined out, which is not generally the case concerning

Oklahoma gas (*Rec., p. 840*). The reason he believes it does not need further purification is because it is fit for use and marketable as it is. He would not call blending a part of the art of refining because it involves no purification, and stated that it is never referred to as a refining process. He regards the recovery of gases at a refinery as a measure of economy and not a process of refining (*Rec., pp. 841-2*). He had visited the plant of the Gypsy Oil Company in 1916, saw the material, that it was casinghead gasoline, water-white in color, and could be compared to distilled water (*Rec., p. 852*). It was not unrefined naphtha. The fact that the product of the Gypsy plant might show a recovery of only 90 per cent on distillation and fail to meet the specifications of customers would not show that that material was not gasoline. He would not consider the blending of casinghead gasoline with naphtha a refining of the casinghead, because it would not involve the removal of impurities, but he would term it a finishing process (*Rec., pp. 853-4*). He considers a finishing process a blending of two materials together to reach certain specifications (*Rec., p. 854*). There are two purposes in blending casinghead product, one, to make it less volatile for handling, and the other to conserve the product. Blending is usually done at a casinghead plant and the product is frequently marketed direct (*Rec., p. 854*). The casinghead product could be marketed, without being blended, to buyers who make a business of blending that use it in blending with naphtha (*Rec., pp. 854-5*). In his opinion blending would not be refining but merely a mixing. He has never seen the term unrefined naphtha applied to casinghead gasoline in any technical work, and so far as his knowledge goes it is not so applied in the scientific world (*Rec., p. 856*). On cross examination he admitted that all scientific literature he had read on the subject uses the word casinghead as a part of the name casinghead gasoline. He was confronted with his own Bulletin 151, wherein he

characterizes the material in question as "condensate," and explains that weathering to a sufficient degree to make it shipable often results in extreme loss, whereas by blending with heavier refinery distillates this loss could be greatly reduced; that this has led "condensate producers" to take advantage of blending to increase the volume of products marketed and also the supply of marketable motor fuel, and "condensates produced by compression is also an undesirable fuel for gasoline engines. It is exceedingly volatile, which causes loss in handling, is dangerous because fumes are easily formed, and gives less power as compared with equal volume but heavier distillates, a larger number of gallons being required to develop the same power. It gives a quick, sharp explosion in a motor cylinder but seems to lack 'push' after the explosion has taken place" (*Rec., pp. 857-8*). A small quantity of natural gas gasoline is sold to consumers unblended as gas machine gasoline, and some known as export gasoline sold in foreign trade; further, that the great bulk of condensate is blended one way or another before it reaches the consumer, but not always completely blended at the plant where made (*Rec., p. 858*). He then admitted that the material might properly be termed unfinished gasoline if it was still to be finished by further blending in order to meet some specifications (*Rec., pp. 858-9*). Further in his bulletin it was shown that he related the very practice followed by the Gypsy Company of blending in stages at different points, and then admitted that the operation was not complete until finished at the refinery (*Rec., pp. 859-60*); following which his bulletin states that where the blending is by refining or blending companies as last described, "the operation is complete and the blended product is ready for market" (*Rec., p. 860*). Excerpts from his bulletin also related the practice of partial blending at the casinghead plant and explained that some operators, because of the cost of bringing in the large quantities of

naphtha necessary, or because they control a refinery and desire to refine the gasoline by a further treatment such as distilling, follow the practice of blending at the compression plant only so far as necessary for shipment, the final blending and treatment being given at the refineries or points where the desired quantities and qualities of distillate may be more readily obtained (*Rec., p. 860*).

He defined gasoline as the lighter petroleum distillate fit for use in an ordinary automobile (*Rec., p. 863*); that gasoline is a finished product of a petroleum refinery (*Rec., p. 865*), and that it is a product of the fraction of petroleum long known under the generic name naphtha, which includes all those lighter hydrocarbons above kerosene. Gasoline and naphtha are names interchangeably used with relation to the material of which the finished product, gasoline, is made, and naphtha is a generic term which embraces gasoline (*Rec., p. 866*). He stated that the process of distillation in a refinery which produces still gas is a parallel process to that under the earth and that for that reason he considered the casinghead product refined, although he would not go so far as to call the still gas refined gasoline before condensation, but claimed that it might be, after condensation, and gave as the only instance to his knowledge of it being so sold an occurrence in Alaska in 1913 (*Rec., pp. 867-8*); and, so far as he knew, in the United States the practice was universal to further refine the material before it was sold as refined gasoline, and blending was practiced at refineries of this material long before casinghead gasoline was known (*Rec., p. 868*). When his theory, that the separation of the constituents underground amounted to refining as applied to the casinghead condensate, was attempted to be applied to the remaining crude, he could not see how you could consider the crude oil refined (*Rec., pp. 868-9*). He finally admitted that his notion of a refining process was making a thing pure by the re-

moval of impurities, and that it could therefore be said that a thing which it was unnecessary to make pure, because it was pure, would be unrefined (*Rec., p. 869*). Trade publications do not quote the material as gasoline but as raw casinghead, or casinghead, or some particular kind of blend. He never knew of a curb filling station selling raw casinghead material as gasoline (*Rec., pp. 870-1*). The ordinary scientific tests to determine whether or not a material is gasoline are from the boiling points obtained by fractional distillation (*Rec., pp. 871-2*). The naphtha fractions, upon being separated from the crude in a refinery, might properly be called unrefined naphtha; and the first time he heard the expression it imported to his mind the lighter cuts of petroleum which needed further purification, a part of which cuts is the material from which gasoline is made, and it would embrace the so-called still gas gasoline (which he previously admitted was identical with the casinghead product) (*Rec., pp. 838, 872-3*). When gasoline fails to reach specifications it is ordinarily blended to get it to some marketable specification (*Rec., p. 873*). The casinghead material is frequently and very generally used by refiners as a raw material from which to make gasoline (*Rec., p. 873*). His Bulletin 151 is *Exhibit 150;* Bulletin 214, of the Bureau of Mines, by E. W. Dean, is *Exhibit 151,* and shows that the Government itself uses and recommends the practice of determining the material by distillation curves (*Rec., pp. 874-5*).

As reasons why this Court should review this case, the Solicitor General, at page 11, under Point II of his Brief, asserts that it is a case of great magnitude, upon the determination of which the rights of many other parties depend; and the Director General, on the opening page of his Brief, asserts that the judgment of the Circuit Court of Appeals probably subjects him to liabilities for overcharges in this respect aggregating $500,000.

Why these assertions are persisted in in the face of the known fact that, apart from the other indictments relating to the same transactions, there is only one other cause that can be affected, *i.e.* the suit of the Texas Company for far less than $100,000 (and the statute of limitations has long since run against any other possible overcharge suits), is inexplicable.

Next, the Solicitor General, under his Point II, asserts that the article is generally known by the trade and in commerce and among those by whom it is produced, used and consumed, as gasoline. These statements are directly contrary to the evidence. The only attempt made by the Government to prove the practice of the trade in relation to what the material should be called, was by the witness Haigh of the Ajax Company, who stated (*Rec., p. 396*) that he designated the material shipped by his company as gasoline "simply as a trade name"; and this testimony was immediately stricken out on motion of the defendant (*p. 397*) on the ground that the witness was not qualified; and on his cross-examination (*p. 402*) it developed that what the witness was in fact talking about was a blend to a gravity of 56 to 58 degrees—one which defendant concedes might be deemed gasoline—; and he further testified on cross-examination that he did not call the unblended material similar to that shipped by defendant gasoline, but that it was sold and shipped to refineries, he supposed, to be further refined (*pp. 401-404*).

Next, under Point III (*p. 12*), the Solicitor General asserts, as does the Director General (*Point I, p. 2*), that the Circuit Court of Appeals disregarded entirely the regulations of the Interstate Commerce Commission made within the scope of its authority under the so-called Transportation of Explosives Act, and thereby practically nullified the powers of the Government under that Act.

The fact is that the Safe Transportation Regulations were in no wise in issue in the District Court; the only contention made by the Government with respect thereto being that they were evidentiary of the fact that the material should be called gasoline, and they were so received by the Court and submitted to the jury.

As before pointed out, these regulations were not made pursuant to the Commission's authority to make rates, but expressly under its authority under the Transportation of Explosives Act, and they do not purport to affect or control rates.

Furtherfore, as stated in the Government's petition (*p. 7*), there are other indictments pending against respondent charging violation of the Safe Transportation Act; and it was shown that the defendant, in fact, by the use of the double description, continuously complied with the Safe Transportation Regulations as such, which fact was even conceded by the Government.

Next, the Solicitor General, under Point IV (*p. 12*), and the Director General, under Point II (*p. 2*), of their respective briefs, assert in substance that the administrative functions of the Commission are interfered with by the opinion of the Circuit Court of Appeals, and they cite the decision of the Commission in *Southern Carbon Co.* v. *Arkansas & L. M. Ry. Co., 62 I. C. C. 733,* in support of their contention. The Commission has never passed on the question in its administrative capacity, and the very contention that the Commission's administrative functions are involved concedes the argument made under Point IV (3) hereof that in such case the District Court was without jurisdiction until the Commission should pass upon the subject. However, the case cited does not sustain their contention, as the Commission did not pass upon the applicability of the description "unrefined naptha" in that case, there being no rates under that description in effect, but simply in sub-

stance held that under the rates there available the "gasoline" rates were applicable. And, in its most recent decision (February 6, 1925) mentioning the product, the Commission refer to the blending of "casinghead gasoline to produce commercial gasoline."

> *Transcontinental Oil Co.* v. *A. & V. Ry. Co., 96 I. C. C. 136, 137.*

At page 13 of his brief, the Solicitor General argues that the Circuit Court of Appeals erred in holding that the Government throughout the trial improperly insisted that the conduct of the defendant was fraudulent.

Respondent contends that a charge of defrauding the carriers (amenable under Section 10 of the Interstate Commerce Act) is repugnant to and inconsistent with the charge in the indictment of receiving a concession, which matter is argued under Part III (a) hereof.

At page 22 of the Solicitor General's brief, he states that it was admitted that from the time the plant was constructed in 1913, up to the end of 1914 or 1915, the practice was to ship naptha from Port Arthur to Kiefer, and there blend it with casinghead gasoline, and ship the blended product to northern points, describing it as "gasoline". If this statement intends to convey the inference that the commodity shipped in 1913, 1914 and 1915 to northern points was the same as that subsequently shipped to Port Arthur under the designation "unrefined naptha", it is directly contrary to the evidence. The admission was clearly limited (*Rec., p. 481*), and the evidence definitely shows that in these earlier days the material shipped North was fundamentally different from that subsequently shipped to Port Arthur as "unrefined naptha". It shows that what was shipped North to market was a product the result of a blend in about opposite proportions designed to make gasoline, and which was in fact sold as gasoline, and which defendant conceded, and now concedes, was and is gasoline, although of a poor and unsatisfactory quality, which was the cause of the discontinuance of the efforts to blend to

the extent of making gasoline in the field (*Rec., pp. 549, 550, 555*). The very fact that the Solicitor General is himself misled as to the effect of this evidence is the best demonstration of the impropriety of its admission.

At page 27 of the Solicitor General's brief, the testimony of the witness Haigh of the Ajax Company, above referred to, stating that he used gasoline "simply as a trade name", is quoted. As above pointed out, his testimony was stricken out, and his cross-examination showed he was talking about a different material—one which defendant concedes might properly be called "gasoline".

The Solicitor General states (*Brief, pp. 29, 30*) that respondent contends that a product is not gasoline and should not be so shipped "unless it meets the *specifications of the particular order.*"

Recognizing that this assertion is contrary to the whole trend of respondent's contentions, the Solicitor General deems it necessary to substantiate this assertion by quoting from a discussion between respondent's counsel and the Court, but carefully cuts the quotation off to exclude counsel's explanation that it was respondent's contention that it would be shown that the material material in question "is not gasoline by any of the accepted standards" (*Rec., p. 318*).

Again, the Solicitor General refers to the testimony of the witness Pritchard at *pages 590 and 602* of the *Record*, as in substance indicating that, although he might consider a product gasoline because it met the specifications of one purchaser, he would not consider it gasoline for another purchaser whose specifications it failed to meet. The witness was the Government's own witness, even though he was an employee of the respondent. But his testimony does not fairly import that he would contend that such a material was not gasoline for shipping purposes. He was simply answering the query of the Court, and undoubtedly with accuracy, that he would not ship gasoline of one specification on an order calling for gasoline of a different specification.

At pages 38 and 39 of the Solicitor General's brief, he quotes from the testimony of the general freight agent of the Frisco, which he argues substantiates his contention that the carriers did not know what the commodity was that was to be shipped under the designation "unrefined naptha". It is a matter of common knowledge, as the witness testified, that it is not one of the functions of a general freight agent to inspect the commodity tendered by a shipper to see whether it agreed with the tariff description used by the shipper. On the other hand, the evidence shows that the local freight agent, within whose cognizance such a question peculiarly is, was advised at the time the rates on unrefined naptha were initiated that the material theretofore shipped as *gasoline* would thereafter be shipped as *unrefined naptha* (*Rec., pp. 550, 557*); and it was expressly the duty of the safe transportation inspectors to enforce all the safe transportation rules, including Rule 1712, which required that the proper tariff name be used in billing the commodity (*Rec., pp. 429-436*). And for more than two years they did this without raising any question.

At page 46 of his brief, the Solicitor General quotes Dr. Garner's testimony as to the definition of "gasoline" that it

> "would be that low boiling portion of naphtha having a gravity from 76 possibly to 82 and usable for the purpose of illumination";

and then states that this is an exact description of "casinghead gasoline". This assertion is utterly unwarranted by the testimony. It is true that casinghead gasoline is generally within the ranges of gravity mentioned, but there is not a word of testimony to the effect that it is usable for the purpose of illumination; and it is impossible to read the testimony of any of the experts without reaching the obvious conclusion that the casinghead gasoline is far too dangerous to be usable for the purpose of illumination.

Again, at pages 46 and 47 of the Solicitor General's brief, Dr. Garner and Dr. Bacon's testimony is criticised to the effect that the material, to be called "gasoline", must be suitable to run a motor car, as being inconsistent with the fact that "it was demonstrated that it would successfully operate a Pierce-Arrow car". How successfully it did operate that car, has already been shown. But there is no inconsistency whatever in their testimony, and the fact that the casinghead did run the Pierce car under certain most favorable conditions. The evidence shows that a car had also been run on crude oil from the Garber Pool; yet the Government would hardly contend that that fact made that crude oil gasoline.

At page 55 of his brief, the Solicitor General, in describing the joint tests made during the trial, says there is no testimony with reference to the operation of the Packard car, and that presumably therefore there was no trouble in the operation of that car. How such a statement can be made is inconceivable. Both Col. Burrell and Dr. Garner testified that in the test with the Packard car the material failed absolutely, the car going completely "dead", although every opportunity was afforded the Government's experts to try to make it operate (*Rec., pp. 797, 798, 800, 843-851*); and the Government—apparently to avoid putting its own expert who was in the Packard car on the stand, because of the admissions he would have to make—waived their previous claim that he was an expert, although sent by it expressly for the purpose of witnessing the test (*Rec., p. 804*).

Next, at pages 55 and 56, the Solicitor General gives the Standard, Webster and Century dictionary definitions of "gasoline", every one of which states the use to which gasoline is put: the Standard—as fuel in vapor-stoves and for carbonizing air and water-gases; the Webster—as a solvent for oils, fats, etc., as a curburetant, and to produce heat and motive power; and the Century—for saturating air or gas in gas machines or carburetors,

and in the engines of motor vehicles. And, in the face of the fact that the testimony overwhelmingly shows that not only is the material shipped not used for these purposes, but is even admitted by the Government's experts to be not suitable for such use, the Solicitor General baldly asserts that the commodity shipped is strictly in accordance with the technical definition of gasoline.

Throughout its argument, as on the trial, the Government insists that gravity is the sole test of whether or not a material is gasoline. It abundantly appears by all the expert testimony that, although a material must be within certain ranges of gravity to be gasoline, the mere fact of so being does not make it gasoline. It must meet numerous other tests as well. It would seem that common sense would demonstrate that if the material shipped was in fact gasoline, the respondent would sell it as such in markets near its production, instead of going through the expensive operation of carrying coals to Newcastle that would be involved in paying freight to carry it to Port Arthur, where the great body of respondent's gasoline is made, under the necessity of its being thence again reshipped to market, with additional freight charges.

At pages 60 and 61, the Solicitor General presents the novel argument that if, as he contends, the material is in fact gasoline, the Court should have so instructed the jury and that consequently

> "no harmful error could be committed by the court in the admission of evidence, or in his charge to the jury, or in refusing to charge requests presented by the defendant, or by counsel in presenting the Government's case to the jury."

Such a contention would support an argument that in similar circumstances a conviction by a jury composed of but ten members should be sustained because no harm could have been done the defendant.

Finally, the Solicitor General cites several cases by the Interstate Commerce Commission and the Courts, in substance to the point that a question such as that here involved is to be determined by the trade understanding, name or custom. These cases but go to support the respondent's contention. The Solicitor General evidently cites them in reliance on the testimony of the witness Haigh quoted at page 27 of his brief, apparently in ignorance of the fact that this testimony was stricken out, as previously pointed out, and of the further fact that all the evidence, and the only evidence, on the question of trade custom is entirely with the respondent; that is, that the material is not called or sold in trade as gasoline (*Rec., pp. 683, 699, 867, 868, 870, 871*).

At pages 74 and 75 of his brief, the Solicitor General asserts that

> "Had the shipments been billed under any of the designations authorized by the regulations, and hence by the tariffs, the gasoline rate or a rate not lower than the gasoline rate would have been applied."

This assertion is directly negatived by the facts admitted by the Government on the trial, that throughout the period when the regulations read that the material *may be shipped* as gasoline, the bills of lading, in addition to the description "unrefined naptha", bore a specific reference to the Casinghead Rule 1824-K and a stamp showing that the placard usable only on casinghead products had been applied to the car, and after the rules became mandatory that the commodity *must be billed* as "gasoline", "casinghead gasoline" or "casinghead naptha"; that the bills of lading bore both descriptions "unrefined naptha" and "casinghead naptha" and the placard stamp (*Rec., pp. 429-436*).

It was not because of ignorance concerning what the material was that was being shipped as unrefined naptha

that that rate was applied—on the contrary, every one concerned throughout the more than two years involved well knew all along—it was because some one changed his mind about the matter that the question arose.

At page 76, the Solicitor General again insists that the Circuit Court of Appeals was entirely mistaken concerning the opinion of the Interstate Commerce Commission in the *National Refining Company case* (23 I. C. C. 527). We insist the contrary is the fact, and that the Court thoroughly apprehended that case. The mere fact that the toppings there in question were of small value is not of controlling moment. It would of course be of importance if the reasonableness of the rate was in question, but it has no bearing on the issues here. Indeed, if it were not for the use which has been found for the casinghead condensate, the chances are its value would be even less than were those toppings. As the evidence shows, the gas from which the condensate is made was formerly wasted altogether.

The Director General, at pages 30 and 31 of his brief, accuses defendant's counsel of skillfully misleading the witness League into admitting that there "might have been" some difference between the degree of blend of material shipped by others and that shipped by the Gypsy Company; and accuses the Circuit Court of Appeals of misconceiving the true significance of League's testimony that the blend of certain other shippers who shipped and described the blended commodity as "gasoline" contained as much as 75 per cent naptha (*Rec., pp. 446, 447, 441*). The only misleading or misconception there is involved is in the attempt on the part of the Government to represent that the degree of blend is of no importance in determining what the material is. Neither at the trial nor now does defendant contend that a blend consisting of 75 per cent naptha and 25 per cent casinghead should not be called gasoline. On the con-

trary, defendant admitted on the trial that gasoline could be made by such a blend, and that it had in fact itself made, shipped and sold it as such in the earlier days of its operation of casinghead plants.

Again, at page 31, the Director General asserts that the only plausible theory upon which defendant can justify its course is, that the blending was done with heavy naptha, and that such naptha being crude and not refined thus an unrefined naptha is made; and then proceeds to knock down this plausible theory by the argument that therefore the more the naptha, the more unrefined. The trouble with this argument is that the only party which has advanced any such theory is the Government itself, and that for the obvious purpose of criticising it.

The defendant does not contend, and has not contended, that the addition of the crude naptha to the casinghead makes it unrefined. As has been stated over and over again, the grounds upon which the defendant asserts that the adjective "unrefined" is appropriate is that the material is unfinished; that it needs to be taken to a refinery to be finished; that such finishing consists in blending; that blending is an integral part of the art of refining; and that until the material is finished it is in an unrefined state. And this applies to the unblended casinghead just as much as to the blended.

At page 38, the Director General repeats the assertion of the Solicitor General, to the effect that the respondent contends that no material is gasoline unless it fulfills the particular specifications of a particular customer, which, as before pointed out, is quite unwarranted.

At page 39, the Director General attempts to draw some broad distinction, which he supposes to exist, between a distillate and a condensate. Evidently he does not understand that all distillates are in fact condens-

ates; nor the Government's own experts' theory that the casinghead condensate was a distillate, the first operation of which was produced by nature underground (*Rec., pp. 837-839, 879-880*).

The Director General, at page 49, and again at page 54, referring to still gas gasoline, denominates it "still gasoline".

With such an utter misconception of terms, it is impossible to point out the fallacy of his contentions without a detailed reference to the testimony, the substance of which is hereinbefore set forth at length.

At page 71, the Director General calls attention to the fact that one of the Government's experts never heard of casinghead naptha before hearing it in this case; which but betrays the inexpertness of the witness himself, since it is a term specified by the Interstate Commerce Commission in its Safe Transportation Regulations set forth in italics by the Director General on page 18 of his own brief.

The Director General seems to make much point of the testimony of some of the experts to the effect that, while they considered the name "unrefined naptha" entirely appropriate, if they were choosing a name that would be more descriptive in their mind they would prefer "unfinished naptha". While we regard this as of no importance, it may be observed that the respondent, in its telegram quoted at page 77 of the Director General's brief, requested the carriers to establish rates on "unfinished naptha"; and it was apparently either by accident of the carriers or through a desire to follow the precedent established in the Muskogee and Carterco rates that the term "unrefined naptha" was used in the tariffs, instead of "unfinished naptha".

At page 79 of the Director General's brief, referring to the Commission's decision in *National Refining Co.* v. *M. K. & T. Ry. Co., 23 I. C. C. 527* (printed in full at *page*

1378 of the *Record*), it is stated that a reference thereto will show that the Commission

> "held the gasoline rates legally applicable, but merely unreasonable," etc.

This is an absolute misstatement of what the Commission held.

Reference to the opinion shows that the carriers contended that the product there in question should be classified as a refined oil; that the complainant contended it should not; and, after stating these contentions and the fact that the product

> "seems to have no distinct commercial designation or trade name" (*Rec., p. 1381*),

it says:

> "Moreover, this light end distillate, while it has been increased in value by a process of manufacture, was not what is commercially understood as a refined product of petroleum oil".

And finally concludes (*Rec., p. 1383*) with a repetition

> "that there is no trade name or commercial designation for the commodity here in question, and we deem it best to leave the description of this commodity in the first instance to defendants, who were doubtless so able to amend their tariffs as to establish the rates above found reasonable in such language as will not lend itself to misunderstanding or afford opportunities for misbilling."

Manifestly, it would be a contradiction in terms for the Commission to say that the gasoline rates were legally applicable, but merely unreasonable as applied to this particular commodity. The very statement imports that the particular commodity is not gasoline.

From this necessarily lengthy review of the evidence, these things would seem to be apparent, as pointed out in the motion to dismiss or affirm:

That there is involved in this case no question of uniformity of decision; no question of peculiar gravity or of general importance; that the judgment of the Circuit Court of Appeals does not, as represented on the petition for the writ, have any bearing on the Transportation of Explosives Act; that the Circuit Court of Appeals did not, as represented on the petition for the writ, take the "extradordinary action" of reversing and remanding for dismissal; that the case involves solely one contested question of fact; that the judgment of the Circuit Court of Appeals merely reverses, with directions to grant a new trial, for errors committed in the District Court; that there is an effort now by the Director General to make an issue concerning tariff construction which did not exist in the courts below. The petition presents one case, the briefs show another. The inducing petition fails to give adequate information concerning the record and essential facts. The case set up on the argument now is radically different from that set up in the petition. (*James C. Davis, Agent, etc.,* v. *J. M. Currie; Missouri Pacific R. R. Co., Pet'r,* v. *R. L. Hanna; Erie R. R. Co., Pet'r,* v. *Morris Kirkendall;* all decided November 17, 1924; *69 L. Ed. 85, 56*). And it is believed the writ should be dismissed.

Since the respondent's brief in support of its motions to dismiss or affirm was filed, the section of the Judicial Code under which the Government claims authority for a review of a decision adverse to it in a criminal case, *i. e.* Section 240, has been revised by the Act approved February 13, 1925 (H. R. 8206, 68th Congress), apparently with the object of authorizing such review. The section now reads:

> "Sec. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of

> Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the case had been brought there by unrestricted writ of error or appeal."

It will be noticed that the following important changes have been made:

That the Government is expressly specified as a party entitled to petition; that the case may be removed either before or after judgment, and that it may be determined by the Supreme Court

> "as if the case had been brought there by *unrestricted* writ of error;"

and that it applies to the removal of cases from the Court of Appeals of the District of Columbia; and the limitation of cases made final in the Circuit Court of Appeals by the provisions of that Act is eliminated.

It would seem that those changes demonstrate that the Government was not considered as a party entitled to petition under the language previously used, and that there was an effort to get away from the decisions in the *Sanges* and *Dickinson cases* by the insertion of the word "unrestricted" before "writ of error".

Also since that brief was filed this Court decided *United States* v. *Joseph Weissmann*, December 15, 1924, 69 L. Ed. 147, again reiterating its conclusion that the Criminal Appeals Act authorized writs of error in favor of the Government only in a restricted class of cases, from which it would seem that the limitation on Section 240 previously existing, for review by certiorari

> "with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court,"

would have confined it only to that restricted class of cases covered by the Criminal Appeals Act.

Groupings of Respondent's Assignments of Error in the District Court.

The assignments of error have been grouped to be argued together hereinafter, as follows:

I, II, III and CXVIII (1), which relate to a motion to strike the indictment from the files, and plea in abatement to it, and refusal to permit proof on the plea in abatement; under Part II.

IV and CXVIII (5), being order overruling special demurrer for duplicity of certain counts, and motion in arrest of judgment respecting the same; under Part III (d).

V and CXVIII (2, 3 and 4), being order overruling demurrer to indictment and motion in arrest of judgment; under Part III (a, b and c).

VI, LXXXII, CXVII (13, 14 and 15), and CXVIII (5), being order overruling motion to instruct a verdict for defendant; under Part IV (a).

VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XXXI, XXXII, XXXIII, XXXIV, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVIII, XLIX, LI, LII, LIII and LXXXI, being evidence admitted on the theory of admissions, and order overruling motion to strike out same; under Part IV (b).

XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, L, LXXXI, being evidence admitted concerning practices of others not connected with defendant, and order overruling motion to strike out such evidence; under Part IV (c).

XVI, XVII, LXIX and LXXX, being evidence admitted directed to the discrimination counts, and order overruling motion to strike out same; under Part IV (d).

LVI, LVIII, LIX, LX and LXXXI, being evidence relating to other parties using unidentified material; under Part IV (e).

LV, LVII, being evidence admitted concerning an alleged test; under Part IV (f).

XXXVI, XXXVII, XLVI and LXXXI, being admission of evidence upon the theory of establishing intent, and order overruling motion to strike out same; under Part IV (g).

LIV, LXXIV, LXXXIII, being evidence and charge to jury concerning rates and tariffs; under Part IV (h).

LXII, LXIII, LXIV, LXV, LXVI, LXXI and LXXIII, being rejection of evidence tendered by defendant concerning practices of others; under Part IV (i).

LXI, LXVII, LXVIII, LXX, LXXII, being rejection of evidence offered by defendant on various matters; under Part IV (j).

XXIX, XXX, XXXV, LXXV, LXXVI, LXXVII, LXXVIII and LXXIX, being improper comment and procedure in presence of jury; under Part IV (k).

LXXXII, being order overruling motion to direct a verdict for defendant; under Part IV (l).

LXXXIV to CXVI, inclusive, being instructions to jury requested by defendant and refused by the court; under Part IV (m).

CXVII, being order overruling motion to set aside the verdict and grant new trial, and CXVIII and CXIX, being order overruling motion in arrest of judgment(additional grounds) and sentence; under Part IV (n).

PART II.

The indictment not having been read to the grand jury, cannot be said to be their conscious and intelligent action, and therefore the motion to quash the plea in abatement should have been sustained (Assignments of Error I, II, III and CXVIII [1]).

On arraignment the defendant filed a plea in abatement and a motion to quash and set aside the indictment on the ground that it was not in truth and in fact a true bill, because it had not been read to or by the grand jury, and they did not at any time know the contents thereof, and consequently did not vote upon the same (*Rec., pp. 145-148*); which plea and motion the Court struck out on motion of the Government, declining to allow defendant to make proof of its plea, apparently on the theory that inquiry into the doings of the grand jury would not be permitted to dispute its record.

The Fifth Amendment to the Constitution of the United States, among other things, provides:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in times of war or public danger * * *"

The evident and expressed purpose of this amendment is to secure to persons, freedom from criminal prosecution, except on presentment or indictment by grand jury, unless such persons belong to the excepted classes mentioned in the amendment. In order for the persons sought to be protected by this amendment, in order to give the amendment the force and effect it was intended to have, in order to have an indictment found by the grand jury, in order to prevent robbing the amendment

of vitality, the indictment or presentment found, must be of necessity, the free and conscious act of the grand jury. The indictment or presentment must be couched in the language of the grand jury or in that of some other person consciously adopted by the grand jury as its own. If an indictment or presentment is not couched in the language of the grand jury, if the indictment or presentment is not drawn by another as directed by the grand jury, if the indictment or presentment has not been read to the grand jury, and they do not know what it contains, it cannot be the conscious and intelligent action of the grand jury, and therefore, it cannot, in any just sense of the term, be said to be an indictment found and presented by the grand jury. If an indictment containing many hundred pages and consisting of charges of one hundred different offenses, can be presented to a grand jury as an indictment, and such instrument not read to the grand jury and the grand jury being unacquainted with its contents, endorse it as a true bill, and return it in open court, if such a paper can in any just sense of the term be called an indictment, it is evident that the security intended by the above amendment to be conferred on the citizen, is at once destroyed and of no avail.

The office of the grand jury at common law, was to protect the citizen or subject against unjust prosecution, to make such prosecution depend upon the intelligent action and independent judgment of the grand jury, and not to be instituted at the mere desire, whim or caprice of prosecuting officers representing the crown, and the purpose of the above amendment was to secure and to perpetuate this independent action of the grand jury, and to prevent a citizen or resident of this country from being criminally proceeded against at the mere dictation of the officers of the general government; to prevent such citizen or resident being haled into court to answer any charge, infamous in character, except on the intelligent and independent inquiry of a grand jury. The whole

scheme of criminal prosecution existing in this country and sought to be established by the fifth amendment, will be destroyed if officers of the government are permitted to draw indictments, not acquaint the grand jury with their contents, to have the foreman indorse the indictments "a true bill", and return the same into court as the action of the grand jury.

In *United States* v. *Farrington*, 5 Fed. Rep. 343, motions were filed to quash the indictments, and among other grounds for so doing, was the ground that the indictments were not read to the grand jury, nor the substance of the various counts explained. The indictments were quashed on other grounds and the court did not pass on the particular ground above named, its action on the other ground seeming to make it unnecessary to pass directly on the point that the indictments should have been read to the grand jury. It was insisted that the court could not go behind the return of the grand jury of the indictments to the court, and determine what took place in the grand jury room, but that the indictments must be received as part of the records of the court and free from attack. After reviewing many of the authorities, Judge (afterwards Justice) WALLACE, on *page 347*, says:

> "The rule which may be adduced from the authorities, and which seems most consistent with the policy of the law, is that whenever it becomes essential to ascertain what has transpired before a grand jury it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations (citing authorities), because this cannot serve any of the purposes of justice."

On *page 345* it is said:

> "It is the duty of the court, in the control of its proceedings, to see to it that no person shall be

> subjected to the expense, vexation, and contumely of a trial for a criminal offense unless the charge has been investigated and a reasonable foundation shown for an indictment or information. It is due also to the government to require, before the trial of an accused person, a fair preliminary investigation of the charges against him. The cases are frequent when, after all these precautions have been observed, it appears upon the trial that the government has been subjected to discredit and expense which might have been avoided if there had been a more careful preliminary investigation."

In *United States* v. *Terry, et al.*, 39 Fed. 355, pleas in abatement were filed to the indictments, among other things setting up that the indictments were not read to the grand jury. The court held that the pleas were bad as they tended to contradict the record, but held that the pleas could be treated as motions to quash the indictments and the court so proceeded to consider them and determine the points raised. In discussing attacks on indictments, Judge HOFFMAN, at *page 357*, says:

> "But it has been held that the testimony of grand jurors may be received to show that under a misapprehension of the law the indictment was found on a majority vote of the jury, and without concurrence of twelve of the number, and that therefore it was void, and no true bill; and, *secondly,* that the court, while recognizing the absolute verity which a regular judicial record imports, and the policy on which the rule is founded, yet holds that there has always been and always must be from the necessities of the case a power in the court to vacate or cause to be amended a record which has been erroneously or falsely made, by inadvertency or otherwise, by any of its officers; and that it is competent for it to say, if the claims of justice require it, 'This is not our record; it is false and erroneous, and the authentication it bears is unauthorized and unwarranted'."

It is true the question in the above case was decided adversely to our contention in the case at bar, but it is to be noticed that in the cited case, it appeared that the indictments were brought to the grand jury, that the grand jury apparently knew what was contained in the indictments, and that the grand jury in the presence of the district attorney agreed to dispense with the reading of said indictments and to present the same to the court without reading or hearing read, the said indictments. In the cited case the court was enabled to say from the record and the hearing on the motion (*page 359*):

> "This case was, therefore, passed upon, and the bill substantially, though not technically and formally, found, before the alleged communication to the grand jury of the alleged wishes of Mr. Justice FIELD was made to them. The jury, saw fit to dispense with the reading of the indictments, relying, as they had a right to do, that the district attorney had, in framing the bills, obeyed their directions."

Mr. Edwards, in his work on the Grand Jury, criticizes the *Terry* case above quoted, and says:

> "If the grand jury after hearing the evidence find a true bill without it being read to them, it has been held not to afford ground for setting aside the indictment so found. It is difficult, however, to reconcile this decision with the ruling in *Ex Parte Bain*. It can hardly be said that the finding of a bill, the contents of which are unknown to the grand jurors, is any more their finding than the bill altered in substance after presentment. The grand jury have no knowledge of the nature of the charge to which they give their sanction. They may vote to find a true bill upon the evidence they have heard, while the allegations of the bill to which their sanction has apparently been given may present a totally different offense, and which, if

known to the grand jurors upon hearing the evidence, they would have ignored."

Edwards, The Grand Jury, p. 155.

In *Eubanks* v. *State, 114 Pac. 748,* it appears that witnesses, including members of the grand jury, were examined on the motions to quash, and it appeared from such evidence that the grand jury had never read the indictments and did not know what they charged except as the titles indicated, and did not vote on some out of a bunch of indictments found. The lower court overruled the motion to quash, and, on appeal, the Criminal Court of Appeals reversed the lower court, and after reviewing the case and authorities, say:

> "The common law rule of secrecy has no place under the provisions of our criminal procedure, which recognizes personal constitutional right as superior to every other consideration, and, whenever it becomes essential to the ends of justice to ascertain what has occurred before a grand jury, it may be shown by the testimony of the grand jurors, and particularly whether or not a vote or ballot was taken showing the concurrence of the necessary number of grand jurors to find a true bill; the only limitation being that a grand juror will not be permitted to testify how any member of the jury voted or the opinion expressed by any of them upon any question during their investigations."

In *Ex Parte Bain, 121 U. S. 1,* this Court discharged upon *habeas corpus,* the petitioner for the reason that the indictment on which he had been tried and convicted, had been amended by the court after its finding by the grand jury. The grand jury being a part of the court, and under, at least to a considerable extent, the court's direction and control, and the indictments found by the grand jury being a part of the records and proceedings of the court, it is difficult to say on what theory the court discharged the petitioner on account of the amendment

to the indictment, unless it be that the amendment, not being in the words of the grand jury, could not be the act of the grand jury, and therefore, it was impossible for the court to amend an indictment, because in such amendment it was impossible to secure the concurrence of the grand jury. If this be so, it seems necessarily to follow, that it is equally necessary for the grand jury to be acquainted with the facts and contents of the indictment before it leaves its custody, and is delivered to the court. If the act of the district attorney and the court in amending an indictment vitiate it because such action renders it impossible to be the intelligent action of the grand jury, how can an indictment not read to a grand jury, with the contents of which the jury is unacquainted, be an indictment if it lacks the essential necessary to constitute a valid indictment, namely, the intelligent, independent and conscious action of the grand jury?

There having been some doubt as to the proper method of presenting the questions raised by the motion and plea, the rule varying in different districts, the defendant in this cause has presented the matters challenged, to the attention of the court both in the shape of motion and plea in abatement. Each District Court of the United States seems to have authority to mould to a large extent, its own practice in criminal affairs, and to follow to such extent, as it may desire, the practice of the local courts in which it is sitting. It is true now, as was said by Circuit Judge SWAYNE, in *United States* v. *Ambrose, 3 Fed. 283, 285:*

> "It is proper to remark that the authorities upon the general subject as to how far an indicted party may go behind the indictment, as regards the action of the grand jury, or the questions he may raise, or the objections he may make, or what objections, if sustained, are fatal, or what are otherwise, are in utter confusion upon the subject."

Some of the confusion mentioned, however, has disappeared. There is conflict and decided conflict, between the different courts as to the grounds on which they will set aside indictments. There is still confusion and conflict between the courts as to whether the proper method of attacking the indictments is by motions to quash or by pleas in abatement, or, an application for a rule to the court to file a motion or plea. But all modern cases now seem to recognize the fact that the mere finding of an indictment regular on its face and shown to be regular by the records of the court, does not prevent an attack on the indictment.

See:

*Low's Case, 4 Greenleaf, *440; 16 Am. Dec. 271, 273, 274.*

Re Atwell, 140 Fed. Rep. 368.

Burdick v. *Hunt, 43 Ind. Rep. 381, 389.*

Commonwealth v. *Mead, 12 Gray, 167; 71 Am. Dec. 741, 742.*

State v. *Cain, 8 N. Car. 352, N. S. 187.*

State v. *Fellows, 3 N. Car. 340, N. S. 382.*

State v. *Grady, 84 Mo. 220.*

Boone v. *People, 36 N. E. 99.*

Royce v. *The Territory, 5 Okla. 61, 65.*

People v. *Briggs, 60 How. Pr. Rep. 17.*

Sparrenberger v. *State, 53 Ala. 481, 485.*

United States v. *Coolidge, 2 Gall. 367; Fed. Case No. 14858.*

United States v. *Kilpatrick, 16 Fed. Rep. 765, 773, 777.*

United States v. *Edgerton, 80 Fed. Rep. 374, 375, 376.*

United States v. *Jones, 69 Fed. Rep. 973, 978.*

McKinney v. *United States, 199 Fed. Rep. 25, 27, 28.*

United States v. *Cobban, 127 Fed. Rep. 713, 721.*
Chadwick v. *United States, 141 Fed. Rep. 225, 235.*
United States v. *Rosenthal, 121 Fed. Rep. 862, 873.*
United States v. *Gale, 109 U. S. 65.*
Carter v. *Texas, 177 U. S. 442.*
United States v. *Rosenberg, 7 Wall. 580.*
Holt v. *United States, 218 U. S. 245, 247.*

It is believed that the foregoing authorities clearly demonstrate that the power exists in the trial court, to quash the indictment by motion, or by plea in abatement, when the provisions of law requiring the finding of indictments to conform to certain standards have not been complied with. In no other way can the safety and security of the citizen be obtained. In no other way can constitutional and statutory requirements be enforced. If the mere finding and presentment of an indictment is to close all avenues of inquiry as to whether such indictment has been regularly found; if the presence of such indictment in the records of the court is to be a conclusive answer to an assault on the regularity of the proceedings; if such indictment is to have the conclusiveness of a record adjudication of the regularity of the proceedings preceding its finding, constitutional and statutory requirements and safeguards surrounding the organization of grand juries; the manner of its proceedings, and the manner in which indictmets should be found, are but paper barriers and are worthless as a safeguard to the citizen, save in so far as they may be voluntarily complied with and conformed to by the prosecuting officers and members of the grand jury. Therefore, it seems to us, that the question sought to be raised by the motion and plea in abatement was raised in the only possible manner, and the demurrer of the United

States to them, admitting the state of facts, renders the only question to be decided by this court, whether the defect pled is of such a nature that the indictment should have been quashed. It seems to us upon the record that the indictment should have been quashed as otherwise there would be no security to citizens against unwarranted presentments.

PART III.

Demurrers.

The indictment seeks to charge the defendant with having accepted and received concessions whereby property was transported in interstate commerce at less than the lawful rates, and, in certain counts, concessions whereby property was transported at less than the lawful rates and whereby a discrimination was procured by defendant in its favor as against another shipper.

Each count of the indictment was demurred to generally and the counts attempting to charge both a concession and a discrimination were demurred to specially as well, but as the matter urged on general demurrer goes to all the counts, so that if any ground of general demurrer is sustained it will be unnecessary to consider the ground of special demurrer, the grounds of general demurrer will be considered first. They are as follows:

(*a*) The indictment fails to set forth facts from which the court is able to judge whether what occurred constitutes an offense against the United States, thus failing to meet a fundamental requirement of criminal pleading, in that said indictment simply following the language of the statute, charges the pleader's conclusion that defendant received a "concession."

(*b*) The Elkins Act provides for punishment as a crime of shippers and carriers only, whereas the indict-

ment shows on its face that the defendant is neither.

(*c*) The counts which attempt to charge acceptance of concessions during the period of federal control fail to charge an offense.

(*d*) Counts 36 to 40 and 81 to 85, both inclusive, are double.

PART III (a).

All the counts of the indictment are insufficient in law, in that they wholly fail to state facts sufficient to show that an offense has been committed against the laws of the United States, and that they contain conclusions of the pleader instead of allegations of material facts, and therefore the demurrer should have been sustained.

A host of authorities can be cited for, and none to the contrary of, the proposition that an indictment based on a statutory offense not an offense at common law will not be sufficient merely following the language of the statute, where the offense is one covered by a generic term or not described by words of art having a settled legal significance.

Armour Packing Co. v. *United States, 209 U. S. 56, 83, 84.*

Evans v. *United States 153 U. S. 584, 587.*

United States v. *Hess, 124 U. S. 483, 486-489.*

United States v. *Britton, 107 U. S. 655, 668-670.*

United States v. *Cruikshank, 92 U. S. 542, 557-559.*

Ledbetter v. *United States, 170 U. S. 606, 609, 610.*

United States v. *Bopp, 230 Fed. Rep. 723, 726, 727.*

United States v. *El Paso & N. E. R. Co., 178 Fed. Rep. 846.*

United States v. *Brazeau, 78 Fed. Rep. 464, 465.*

Counsel for the Government in the Circuit Court of Appeals attempted to answer this ground with the oft-quoted generality about modern conditions having relieved the Government of the necessity of complying with impractical standards in pleading, but that is no answer to the authorities above cited.

The contention here made does not require any impractical standard of the Government, but merely that what it conceives to be an offense be stated not in legal conclusions but in plain facts, to which *the court* may apply *its* construction of the law to see whether an offense exists, rather than that the pleading shall rest merely on the *prosecutor's conception* of what constitutes an offense.

As has been stated over and over again by this Court, where "generic" terms are used in the statute, the indictment must descend to particulars, and in any case an indictment must contain "every element necessary to make up the offense."

It needs no argument to show that the word "concession" is a generic term. The decided cases under the Elkins Act embrace, as offenses coming within the term "concession," instances of free demurrage, collection at less than the lawful rate with or without a device, rebates with or without devices, extension of credit, and many other acts construed to be within the description "concession." It is manifest therefore that the word is a generic word, and, consequently, to meet the requirements of the cases in this respect it is not enough merely to use the language of the statute, but particulars of what transpired must instead be stated; that is, whether the defendant, by agreement with the carriers, simply in the first instance paid less than the lawful rate, or whether it paid the full legal rate and subsequently accepted a return of a portion thereof by the carrier, or whether it received something else of value in connection

with the transportation instead of money, the effect of which was a concession.

It will be observed that the indictment fails utterly to meet this requirement, and there is substantial reason why it is essential that it should do so. It is not only conceivable but, as will be demonstrated by an analysis of the *Lehigh Coal & Navigation Company case*, 250 U. S. 556, it is the fact that it was the Government's conception at the time these indictments were drawn of what would amount to a concession under the Elkins Act, that any departure from the rates, conscious or otherwise, would amount to such concession. Yet the case just mentioned squarely shows the error of this view.

The word "concession" is defined by the Standard Dictionary as "the act of conceding; or that which is conceded." Obviously, therefore, an "element" of a concession is the conscious voluntary conceding by the carrier to the shipper of some thing. If the carrier was defrauded by the shipper, this clearly would not be a concession. This is not saying that such fraud would not be punishable, as it of course would under section 10 of the Interstate Commerce Act (upon which charge another indictment is pending in the District Court), but it would not be punishable as a concession under the Elkins Act.

It is clear, therefore, that it is necessary, in order properly to plead the offense of concession under the Elkins Act, so that the court may see that the facts amount to such an offense, that the indictment show that the carrier consciously voluntarily conceded that which it is claimed the receipt of constituted a concession.

Here, the indictment not merely fails to aver that the carrier conceded anything, but it even fails to show what as a matter of fact it is intended to allege the defendant accepted. That the offense of a concession under the Elkins Act must embrace the element of conscious voluntary giving by the carrier does not rest upon the foregoing argument alone, is shown by an examination of the

reported cases construing the Elkins Act. In quite a number of such cases, the question was presented upon the construction of the words "knowingly and wilfully," and it will be found that in each such case the element of conscious giving by the carrier was present—sometimes in the shape of a rebate, sometimes under an express agreement to carry at less than the lawful rate, and sometimes by the devices set forth.

The following are excerpts from a number of cases construing the Elkins Act, and it will be found that this "element" is present in every one of such cases:

In *Lehigh Coal & Navigation Co.* v. *United States*, 250, U. S. 556, the court says:

> "The questions asked depend upon the construction of the Elkins Act, as enacted in 1903 (32 Stat. 847), the relevant part of which is as follows: ' * * * It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall *by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier* (italics ours) * * *.' And under an amendment in 1906 (34 Stat. 584), an offender, 'whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor.'
>
> "The way to a correct construction of the act was to an extent cleared by the case of *Armour Packing Co.* v. *United States*, 209 U. S. 56. Its evolution was there detailed. It was said that carrier and shipper are charged with an equal responsibility and liability and that the act 'proceeded upon broad lines' to accomplish this equal-

ity, and 'that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law.' And this was declared in various ways to be the test of obligation and liability and the 'form by which or the motive for which' its evasion or disregard is accomplished is not of modifying or determining consideration. It was in effect decided that the purpose of the statute took emphasis and meaning from the use of the word 'device,' and 'device' was defined to be 'anything which is a plan or contrivance' and is 'disassociated' from qualification and 'need not be necessarily fraudulent,' and by it the act sought 'to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given or received.'

"It is in effect the contention of the Government that the language of the case exhausts definition and excludes the supposition of the questions of the Circuit Court of Appeals. We are unable to concur. The language of the case is easily explained by the question that was presented for decision. The Armour Packing Company contended that the act was directed only at fraudulent conduct, the obtaining of a rebate by some dishonest or underhand method, concession or discrimination. The language of the court was addressed to this contention and its selection and adequacy are manifest.

"No such contention is made in the case at bar and there are other distinguishing elements. It will be observed that by the statute and decisions the test of equality is the tariff rate. It was said in the opinion that it is 'the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates' *(New York Central R. R. Co.* v. *United States,* 212 U. S. 500, 505). And such was the offense of the Armour Packing Company. There was no evasion of the tariff rate in the case at bar. The filed tariff indicated the existence and obligation of the 10th covenant of the

lease from the Company to the Railroad, that is, the fact of the allowance was declared, though it did not have the specification in figures. The tariff, of course, would have been more definite and complete with such specification, but its sufficiency was certainly believed in, for between 1906 and the date of the indictment it had 262 repetitions. The Company was given besides the assurance that it had the sanction of the Interstate Commerce Commission.

"There was no attempt at deception. The Commission knew by examination of the Company's books of the allowance and the amount of the allowance. Such, then, is the situation, and distinguishes the case from the *Armour Packing Company* case. There there was an omission to comply with the statute and the omission was attempted to be justified by honesty of motive and purpose; here there was compliance or attempted compliance with the statute—a tariff filed—and if a question could be raised upon its legal sufficiency the belief of the Company in its legality was supported by high authority and those circumstances can bring into action and exculpating effect the provision of the statute which requires the acceptance of a rebate to be 'knowingly' done to incur the guilt of a misdemeanor. This conclusion gives no detrimental example against the efficacy of the law.

"We think this comment and conclusion enough to dispose of the questions asked and that there is no necessity to review the cases cited by the Company or the Government" (*250 U. S. 562-565*).

"The indictments in both cases were framed under Section 1 of the Elkins Act before it was amended, and it was held to be unnecessary to set forth the particular device by which the concession or rebate had been granted.

"Reference to the indictment in the case at bar shows that all of the allegations which were considered in the case last cited, as sufficient to sustain the indictment there under consideration, are present here, except the subsequent payment of the

rebate. *But, in lieu of that and in conformance with the facts, it alleges the charging and payment of a lower rate than that provided in the filed schedule or tariffs.* The Elkins Act originally made a carrier who should offer, grant or give a rebate, concession or discrimination criminally responsible. This was amended by the Hepburn Act, so that the carrier, to be criminally liable, must *knowingly*, offer, grant or give a rebate or concession or discrimination."

United States v. *Erie R. R. Co., 222 Fed. Rep. 444, 445, 446, 448.*

See, also:

United States v. *Cleveland, C. C. & St. L. Ry. Co., 234 Fed. Rep. 178, 186.*

United States v. *Philadelphia & R. Ry. Co., 232 Fed. Rep. 946, 949, 951, 952.*

United States v. *Philadelphia & R. Ry. Co., 232 Fed. Rep. 953, 954-956.*

Standard Oil Co. of N. Y. v. *United States, 179 Fed. Rep. 614.*

United States v. *Standard Oil Co., 170 Fed. Rep. 988.*

Standard Oil Co. of Indiana v. *United States, 164 Fed. Rep. 376, 381-383.*

United States v. *Stearns S. & L. Co., 165 Fed. Rep. 735, 736.*

United States v. *Bunch, 165 Fed. Rep. 736, 740, 741.*

In *Atchison, T. & S. F. Ry. Co.* v. *United States,* 170 Fed. Rep. 250, there was involved an indictment on a charge of granting a concession. That case squarely holds that intent of the carrier is of the essence of the offense, and that any departure from its established rates must be wilful in order to constitute a crime. The

lower court was reversed expressly because of its having charged the jury, after striking out the evidence in relation thereto, that it was immaterial that the alleged departure was not intended as such, but consisted in an allowance with respect to alleged loss. The case repeatedly states that for a "departure" to amount to a concession, it must be so intended by the carrier.

In *United States* v. *P. Koenig Coal Co.* 1 Fed. (2d) 738, the precise question here under consideration was involved, and a demurrer sustained to an indictment charging a concession under the Elkins Act, where, as here, there were no facts pleaded upon which the Court could see that there was a conscious yielding or grant by the carrier. In his opinion, District Judge TUTTLE says (*p. 740*):

> "The sole question, however, with which this court is now concerned is whether such conduct constitutes the acceptance or receipt of a 'concession' from a common carrier railroad, as denounced by the statute invoked by the government.
>
> "It is an elementary rule of statutory construction that, in the absence of circumstances indicating otherwise, words used by a legislative tribunal in the enactment of a statute are to be considered as having been so used according to their usual, ordinary meaning.
>
> "The common dictionary meaning of a 'concession' (as illustrated by the definitions in the Century and in Webster's International dictionaries) is 'the act of conceding or yielding, usually implying a demand, claim, or request,' 'a thing yielded,' 'a grant.'
>
> "Now, nothing could be clearer than that, under the express allegations of the indictment involved, the advantage obtained is explicitly declared to have been received by the defendant from the carriers, not as a benefit yielded or consciously granted by them, but solely through and by means of deception practiced upon them by the defendant. The government charges in sub-

stance that the carriers were tricked by the defendant into transporting this coal, which they would not have done 'but for said device and deception.' To say, under these alleged circumstances, that the carriers thus imposed on by the defendant and fraudulently induced to transport this freight were thereby actually granting (although unknowingly) to the defendant a 'concession,' or that the defendant was thereby receiving from such carriers a 'concession', is, in my opinion, to do violence to the plain meaning of language and to fail to call things by their proper names. If an advantage obtained by such artifice and fraud be a *concession* accepted or received by the deceiver from his victim (and, therefore, necessarily granted or given, even although unknowingly, by the deceived), then the hobo who steals a ride on the 'bumpers' of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the pocket of a conductor on a train knowingly accepts and receives a concession 'given' him, though not knowingly. I can perceive no real difference nor distinction in the underlying principles involved in the instances just suggested. In essence they seem to me to be the same. Although I am aware that in the only reported decision, so far as I can learn, involving this precise question (that of the District Judge in United States v. Metropolitan Lumber Co. (D. C.) 254 Fed. 335), a contrary opinion was reached, I am unable, after careful study of that decision, to approve or accept the conclusions there expressed. I cannot avoid the conviction that they embody, and are based upon, the reasoning to which I have already referred and with which I cannot agree.

"A careful reading of the Elkins Act leaves no doubt that its purpose was to punish and prevent the favoritism of shippers by common carriers in interstate commerce, and that, in order to more effectually accomplish this purpose Congress, after originally legislating against only the carriers who granted such favoritism, extended its prohibitions, so as to reach also the recipients of, and par-

ticipants in, such favoritism, namely, the shippers who, by knowingly accepting or receiving such unfair favors, promoted and made them possible. In the language of the report of the committee on interstate commerce in reporting the bill to the House (which report, of course, is entitled to consideration in the judicial construction of the statute), the committee believed that the Elkins Act, together with the Interstate Commerce Law then existing, covered about all possible means 'to prevent the granting of discriminations in favor of one shipper against another, or the building up of one concern through the favoritism of railroad corporations.'

"Nor is it without significance, as bearing upon the meaning of this statute, that an entirely different statute (section 10 of the Act of Feb. 4, 1887, c. 104, 24 Stat. 382, as amended [Comp. St. sec. 8574], expressly forbids the obtaining of various kinds of rebates by means of false statements, 'whether with or without the consent or connivance of the carrier,' being apparently intended by Congress to relate to an evil not also covered by any other statutory provision.

"In view of the considerations mentioned, and bearing in mind that the penal statute involved should be construed strictly, and limited to the plain meaning of the language used, I reach the conclusion that it cannot properly be so extended as to include within its prohibitions the conduct charged against the defendant by the indictment at bar.

"For the reasons stated, the demurrer must be sustained on the first ground therein presented, namely, that the acts alleged in the indictment do not constitute the offense charged. There is therefore no occasion to consider the objections urged to the validity of the service order involved. An order will be entered sustaining the demurrer."

It should be remembered in this action that the Government, throughout the trial and in summing up, in-

sisted that the defendant had defrauded the carriers in the transactions involved in the indictment, which insistence upon the part of the Government is itself assigned as error, and so found by the Circuit Court of Appeals.

Manifestly it cannot be consistently argued in one breath that the defendant deceived and defrauded the carriers, thereby obtaining an advantage, and in another breath that the defendant received a concession from a conscious yielding by the carriers.

The point made under this subdivision is that the indictment not only nowhere alleges facts, or even a conclusion, that the carrier voluntarily conceded that which it is claimed the defendant obtained; and facts are not even alleged that the defendant received anything—merely the bald conclusion of the pleader that it obtained a concession. There is no allegation that a certain rate was paid, and thereafter a refund of a portion of it made, or that a lower rate was collected than that legally applicable, or any other manner or form of concession described.

United States v. *Peterson, 1 Fed. (2d) 1018.*

PART III (b).

The Elkins Act provides for punishment as a crime of shippers and carriers only, whereas the indictment shows on its face that defendant is neither.

The indictment, after setting forth the existence of the routes and rates, and the shipment by the Gypsy Oil Company of certain cars to the Gulf Refining Company at Port Arthur, then charges that freight charges in a certain amount (computed at the rate mentioned upon the weight of the shipment described):

> "became due and payable and became a lawful debt and liability of the said Gulf Refining Com-

pany and payable to the said common carriers for the transportation."

There is not a word of explanation in the indictment as to why or how this sum "became a lawful debt and liability" of the said Gulf Refining Company, that being purely the pleader's conclusion.

The indictment clearly shows that the Gypsy Oil Company was the shipper of the substance shipped. It does not show or state under what conditions the substance was shipped, as to payment of freight, whether freight was prepaid; whether the freight was to be collected by the railway company from the consignee at the end of the shipment, is not stated as a fact. So far as any statement of fact in the indictment is concerned, it is silent. The facts as pled in the indictment, show a legal duty and obligation resting upon the Gypsy Oil Company to the railroad company for the payment of the freight. There was no contractual relation between the Gulf Refining Company and the railroad. What, if any, liabilty could attach to the Gulf Refinng Company for freight on such shipments, is left to conjecture. The pleader attempts to cure this. It is sought to be covered by the above quotation, which is certainly a conclusion of the pleader and not the statement of facts upon which such conclusion rests. It is evident (*1*) that so far as the statute itself embraces liability for freight as a matter of law, such liability is imposed upon the shipper and not the consignee. The shipper makes the contract of shipment, not the consignee. The mere shipment of freight, whether accepted or not, would create a liability on the part of the shipper to the carrier of freight. No such liability could rest on the consignee unless goods shipped were shipped with freight collect, and his acceptance of the goods would thereby raise an implied agreement on his part to pay. Again, if the goods were shipped with freight unpaid,

the carrier would have a lien on the goods for his freight and other charges, and the surrender by the carrier of such goods, to the consignee, and the consequent loss of his lien on the goods, would create a liability on the part of the consignee to pay, which would be supported by the consideration that the consignee received the goods and the carrier had lost his lien. No facts are stated in the indictment which would raise such a condition. Outside of the general conclusion of the pleader, no fact is stated which shows liability on the part of the Gulf Refining Company. Outside of the conclusion of the pleader, there is nothing from which anyone can conclude any legal liability on the part of the Gulf Refining Company; nothing that negatives the idea of the primary liability of the shipper, in this case, the Gypsy Oil Company; nothing that negatives a presumption that the goods were shipped freight prepaid. The words, "became a lawful debt and liability" are so evidently a conclusion, that it is scarcely worth while to argue that it is not a statement of fact. It is not for the pleader to determine whether the freight "became a lawful debt and liability" of the Gulf Refining Company, but the indictment to be good must state such facts as will enable the court on an inspection of it, to say as a matter of law, that on the facts so stated the freight mentioned in the indictment "became a lawful debt and liability." (*2*) Again, we contend that the indictment in this case should have been quashed for the reason it clearly appears on the face of the indictment, that Gypsy Oil Company is the shipper and the Gulf Refining Company the consignee, and, under the Act of February 19, 1903, as amended by the Act of June 29, 1906, it is the shipper and the carrier that can be indicted, and only these persons, under the circumstances stated in the indictment.

We think this is evident from the language of the two acts and therefore set them out so far as the same

are here relevant. The Act of February 19, 1903, 32 Statutes at Large, 847, provides:

> "and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive, any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce, by any common carrier, subject to said Act to Regulate Commerce and the acts amendatory thereto, whereby any such property shall by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and acts amendatory thereto; or, whereby any other advantage is given, or discrimination is practiced. Every person or corporation who shall offer, grant or give, or solicit, accept or receive any such rebates, concessions or discrimination, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $1000.00 or more than $20,000.00."

It will be seen from the above statute that every person, etc., that had anything to do with the unlawful transaction, were made subject to indictment. The Act of June 29, 1906, 34 Statutes at Large, 584, commencing at the bottom of page 587, provides as follows:

> "and it shall be unlawful for any person, persons, or corporation, to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said Act to Regulate Commerce and the acts amendatory thereof, or whereby any advantage is given or discrimination

> practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive, any such rebates, concession, or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1000.00 or more than $20,000.00."

It will be noticed that the only difference in this act and the Act of February 19, 1903, is that where the Act of February 19, 1903, uses the word "thereto," the above act uses the word "thereof," and in the portion of the act defining the misdemeanor, the above statute inserts the words "whether carrier or shipper," and the word "knowingly," so it seems evident that there could be but two purposes that Congress had in view in the amendment last above cited, for with the exceptions above named, the two acts are identical. The purposes intended to be wrought by this amendment, it seems to us, are two: (*a*) First, the act denounced as criminal, must be knowingly committed; and (*b*) the words "whether carrier or shipper" could have been inserted for only one purpose, and that was to limit the generality of the language preceding such words and limit the generality of the act it amends. The words immediately preceding "whether carrier or shipper," are broad enough to embrace every person who could by any possibility have any connection with the transaction, for they are sufficiently broad to include every person, natural or artificial in being. Therefore, the words "whether carrier or shipper" could not have been introduced for the purpose of making more general or more embracing, the preceding portion of the statute. Therefore, it follows that they must have been introduced for the purpose of limiting the class who could be guilty of a misdemeanor. Before defining the misdemeanor, the act just cited, as well as the act which it amends, declares without limitation that it shall be unlawful for any per-

son, persons, or corporation to do any of certain specified acts, but this generality is limited when it comes to define and set out and make criminal the act declared to be unlawful. This seems to us to be not without reason. The acts merely declared to be unlawful, are necessary for the protection of the public, and those acts so declared to be unlawful, can, in proper cases, be enjoined by the court in the exercise of its equitable powers. They may be the basis for an action for the recovery of damages, an action for reparation, but when it comes to define the crime, then Congress, it seems to us, has wisely limited the crime to the two persons who ordinarily could be the only persons guilty—the shipper and the carrier.

Tucker v. *St. Louis-San Francisco Co., 233 S. W. Rep., 512.*

PART III (c).

Counts 36 to 40, inclusive, 65 to 80, inclusive, and 80 to 100, inclusive, of the indictment, covering shipments during federal control, are bad both in pleading and in substance.

The above-numbered counts all relate to shipments transported during federal control. It is contended under this point that they are bad as matter of pleading in alleging that the named carriers had published and filed the rates alleged to have been in effect, and had performed the transportation, and that the defendant had accepted and received concessions from said named carriers, instead of alleging that the rates had been published, or at least adopted by the Director General or the United States, that the transportation had been performed by him, and the concession obtained from him.

It is also contended that the Elkins Act had no application to shipments transported during federal con-

trol, and that consequently the counts are bad in substance as well.

The counts are substantially similar, except that certain of them, in addition to attempting to charge concessions, also attempt to charge discrimination, both in violation of the Elkins Act.

By reference to the first of these counts, 36 (*Rec., p. 53*), it will be observed that it charges that on and prior to December 28, 1917, the Midland Valley, the Kansas City Southern and the Texarkana & Fort Smith railway companies were each corporations and

> "operated connecting railway routes and were common carriers engaged in the transportation of property, including gasoline, for hire over their connecting railway route," etc.,

from Kiefer, Oklahoma, to Port Arthur, Texas, and so subject to the Act to Regulate Commerce (II); that on December 26, 1917, the President, by proclamation, assumed

> "control of certain systems of railway transportation, including the railway routes of the three common carriers aforesaid, and did in said proclamation direct that the control, operation and utilization of such transportation systems should be exercised by and through the Director General",

and that from December 28, 1917, to June 1, 1918,

> "said railway routes and lines of transportation of the three said common carriers were controlled, operated and utilized by the Director General of Railroads, which control, operation and utilization is herein termed federal control". (III).

That from January 1st to June 1st

> "said three common carriers under federal control had printed and had filed with the Interstate

> Commerce Commission of the United States, and had published, schedules and tariffs of rates and charges * * * which showed that the lawfully established rate for the transportation of gasoline"

from Kiefer

> "over the aforesaid connecting through railway route"

to said Port Arthur, was 33 cents for each 100 pounds. (IV). That throughout said period the Texas Company was engaged in shipping gasoline from Kiefer over the aforesaid through railway route to Port Arthur, and at divers times did ship large quantities of gasoline from Kiefer to Port Arthur

> "at the said lawfully established rate of thirty-three cents per hundred pounds"; (V).

That during said period, on January 25th

> "and while the aforesaid schedules and tariffs of rates and charges were in force and effect,"

the Gypsy Oil Company, at Kiefer,

> "did deliver to the said common carriers under federal control, for transportation, a large quantity of gasoline,"

etc., and that pursuant to instructions given by it

> "the said common carriers under federal control did transport said gasoline in said tank cars over the aforesaid through railway route," etc.; "that thereupon freight charges in the amount of $1,760.19, at the aforesaid lawfully established rate of thirty-three cents for each 100 pounds thereof, became payable and became a lawful debt and liability of said Gulf Refining Company, payable to said common carriers under federal control, for the transportation", etc. (VI).

That on February 21, 1918, said Gulf Refining Company

> "unlawfully did knowingly accept and receive from the said common carriers under federal control a concession in respect to the transportation of the last mentioned shipment * * * and whereby a discrimination was practiced in favor of said Gulf Refining Company," etc. (VII).

It will be observed that throughout the count attempts to charge that the rates claimed to be the legal rates were published, printed and filed by

> "said three common carriers under federal control";

that the transportation was performed by them, and that the alleged concession was received from them in the face of the fact that it charges in the third paragraph that their properties were under federal control and were operated by the Director General. The phrase "under federal control" does not help the expression. It cannot refer to the Director General, for he could not be *three* common carriers. The second paragraph distinctly describes the corporations as being common carriers, and names three of them, and they are the only persons referred to or described as common carriers. The expression "common carriers under federal control", used in the indictment, was undoubtedly taken from that expression as used in the Federal Control Act (March 21, 1918; Chap. 25, 40 Stat. L. 451; Comp. Stat., Sec. 3115 ¾a; Fed. Stat. Ann. Supp. 1918, p. 757).

As this Court said in *E. I. Dupont de Nemours & Co., Pet'r.* v. *James C. Davis, Director General,* etc., 264 U. S. 456, decided April 7, 1924, 68 L. Ed. 788, that statute

> "repeatedly recognizes a distinction between the President—including, of course, the Director

> General—and the carriers. The first section itself limits the meaning of the word 'carriers' to railroads and systems of transportation which, as carriers, had been taken over by the President. Accurately speaking, the Director General was not a carrier, but an operator of carriers. The distinction to which we have referred constantly appears in the provisions of the act, as, for example: 'The President may, nevertheless, pay to any carrier while under Federal control an annual amount,' etc., Sec. 2; 'On the application of the President or of any carrier,' etc., Sec. 3; 'Carriers while under Federal control shall be subject to all laws and liabilities as common carriers,' etc., Sec. 10; 'Actions at law or suits in equity may be brought by and against said carriers,' etc., Sec. 10; 'Moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States,' Sec. 12."

As this Court has so definitely held that the expression "carriers under Federal control" does not mean the Director General, it follows that the pleading of the indictment in these counts is quite erroneous. Assuming, though not conceding, that a charge of obtaining a concession or discrimination might properly lie during federal control, it follows that it would be necessary for the indictment to allege that the United States or the Director General had published and filed the rates—or adopted those theretofore published and filed by the carriers—and that the concession had been obtained from the United States or the Director General.

Apart from the question of pleading, it is also contended here that the Elkins Act had no application to transactions during federal control. This both by the letter of the statute and in reason.

The Elkins Act (32 Stat. L. 847), as amended by the Act of June 29, 1906 (34 Stat. L. 584), provides that

> "it shall be unlawful for any person, persons, or corporation, to offer, grant or give, or to solicit, accept, or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce * * *."

Clearly the United States, acting as it did in its sovereign capacity, cannot be said to be a common carrier.

In the *Dupont case, supra,* this Court said:

> "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain' (North Carolina R. Co. *v.* Lee, 260 U. S. 16, 67 L. ed. 104; Missouri P. R. Co. *v.* Ault, 256 U. S. 554, 65 L. ed. 1087; Northern P. R. Co. *v.* North Dakota, 250 U. S. 135, 63 L. ed. 897; Re Tide Water Coal Exchange, 280 Fed. 648, 649); and it may not be held to have waived any sovereign right or privilege unless plainly so provided." (*68 L. Ed. 791*).

See, also:

Northern Pacific Ry. Co. v. *North Dakota, 250 U. S. 135.*

In the *Dupont case, supra,* it was contended that the Director General was a common carrier subject to the Act, and as such barred by the three-year statute of limitations contained in Section 16 of the Interstate Commerce Act, reading:

> "All actions at law by carriers subject to this Act for recovery of freight charges or any part thereof shall be begun within three years from the time the cause of action accrues, and not after."

In its opinion, this Court said:

> "It is insisted that the United States—by the Director General representing the United States —is included in the provision as a carrier subject to the Act. Our opinion is otherwise."

It is difficult to give a general definition of the term common carrier without including within the definition certain duties of, and the rules of law applicable to the transaction of the business. It may be defined, generally, however, as one who engages to transport for hire from place to place goods of such persons as choose to employ him, and its distinctive characteristic is that the undertaking is to carry for all persons indifferently the goods he is accustomed to carry and, therefore, in some measure is considered as a public servant.

In *The Niagara* v. *Cordes,* 21 Howard 7, 16 L. ed. 46, this Court defines the term as follows:

> "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him, from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey."

In *The Cape Charles,* 198 Fed. 346, at page 349, defining a common carrier, the court says:

> "The distinction which marks a common from private carrier is clearly defined. A common carrier is one who openly professes to carry for hire the goods of all such persons as may choose to employ him. Redman's Law of Railway Carriers (2d ed., 1880) 1. In some cases it is said that the test whether one comes within the definition of a common carrier is whether he holds himself out to carry goods for every one who applies to him.

SIMPSON, C. J., says: 'The true test of the character of the party, as to the fact whether he is a common carrier or not, is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry for all? If it is his legal duty to carry for all alike who comply with the terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which, for wise ends, have long since been adopted and uniformly enforced, both in England and in all the states, upon common carriers.' *Piedmont Mfg. Co.* v. *Columbia etc. R. Co.*, 19 S. C. 353; 16 Am. & Eng. R. R. Cas. 194. A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward. *Pennewill* v. *Cullen*, 5 Har. (Del.) 238."

In *Woods Railway Law*, page 563, section 195, it is said:

> "At common law *every common carrier is bound to receive goods from all persons alike* without making any personal distinction, *without giving any unjust or unreasonable advantage by way of facilities for the carriage or rates for transporting them*, and statutes prohibiting discrimination are held as merely confirmatory of the common law."

In *6 Cyc 372*, it is said:

> "Common carriers owe to the public the duty of carrying *indifferently for all who may employ them and in the order in which the application is made* and without discrimination as to terms."

In *Mershon et al.* v. *Hobensack*, 22 N. J. Law 372, the court says:

> "Every person who undertakes to carry for compensation the goods *of all persons indifferently is a common carrier.*"

In *Maslin* v. *Baltimore etc. Ry. Company*, 14 W. Va. 180, at page 188, the common carrier is defined as follows:

> "One who undertakes for hire to carry from place to place the goods of all persons indifferently."

In *Hutchinson on Carriers*, section 47, the definition is as follows:

> "One who undertakes as a business, for hire or reward to carry from one place to another *the goods of all persons* who may apply for such carriage."

In *Watkins on Shipments and Carriers*, (3rd ed.) volume 1, section 36, page 220, it is said:

> "It is axiomatic that a common carrier is not at liberty to accept or decline shipments or to accept or decline passengers."

In the same volume, section 61, page 275, it is said:

> "The duty of a common carrier to transport, at reasonable rates, exists at common law. This was, and is, true because the business of carriage for the public is of a quasi-public nature and the charges therefor are subject to the regulation by the public."

To the same effect see:

Gisbourn v. *Hurst, 1 Salk. 249, 91 Rep. 220;*
Orange Bank v. *Brown, 3 Wend (N. Y.) 158;*
Jackson Architectual Iron Works v. *Hurlbut, 158 N. Y. 34, 38, 52 N. E. 665;*
The Huntress, 12 Fed. Cases No. 6914;
2nd Chitty's Blackstone, (Am. ed 1830) 451 Note 22;
1st Leigh, N. P. 507.

Authorities to like effect could be multiplied indefinitely, but we assume multiplication to be unnecessary.

It necessarily and conclusively follows from the above and foregoing authorities that the term common carrier means one who operates an instrumentality of transportation, who possesses certain characteristics and on whom the law imposes certain duties and casts certain obligations which inhere in the very definition of the term and in the very nature of the business. That these duties and obligations are imposed under a sanction, and chief among such duties and obligations is that to transport for all without preference, and to receive, transport and deliver goods, without discrimination as to facilities, and the absence of these distinguishing features, the legal power to disregard and hold for naught such duties and obligations inhering in the very nature and character of the business must destroy, and, of necessity, does destroy, the character of a carrier as being a common carrier. Carriage cannot be said to be *common when the carrier possesses the power of selection; it cannot be said to be indifferent when the power of preference and precedence exists;* it cannot be said to be obligatory when the power of denial or election exists; yet, in the transportation of property over the railroad systems under federal control, *the United States possesses the power of selection, the power to transport for one and deny transportation to another;* the power of preference and precedence exists as to such states in transporting property, and, therefore, *in no just sense of the term can the United States in the control of the railway systems of the country be said to be a common carrier.*

Again, the very circumstances under which the United States assumed control of the railroads and the purposes sought to be accomplished thereby are such as of necessity preclude the idea that *it assumed the duties and obligations of a common carrier, for the chief reason, if not the sole reason of such assumption,* was to free trans-

portation of the hampering fetters, restrictions and obligations inhering in the very nature of the business of a common carrier, and to permit transportation to be had without reference to such trammels, and the exercise of the general right of transportation freed from such restrictions was considered a power too great, a power too susceptible of abuse, too fraught with possibilities of evil to be entrusted even to persons of quasi-public character *and could only safely be confided to and exercised by the federal government.* These reasons account for the federal control acts and why the government was directly put in operation of the railroads and the railroad companies not permitted to operate the railroads under governmental direction.

To hold that in the assumption of control of railroads and the transportation of goods, etc., over them, the government is a common carrier, is, it seems to us, by judicial ukase, to defeat the legislative purpose and destroy the congressional intent in conferring such power. *For the very purpose of the assumption, the obvious necessity of federal control was to free the transportation systems from the hampering and fettering duties and obligations of common carriers and permit the government to carry on the business of transportation freed of the restraints that were "harassing but unavoidable"* so long as such systems were operated by private enterprise and under control of private corporations; was to give the United States the absolute, unlimited and unfettered right to operate and use such systems, not only for the purpose of transporting troops, munitions and war equipment and material, *but to give priorities to private shippers who were only remotely, if at all, connected with the government, and indeed to prohibit certain freight movements entirely.* To regulate and control shipments so the necessities of different communities could be supplied without material interference with the desire, if not the absolute duty of supplying the necessities of our allies.

The United States acquired the right of possession and control of the country's transportation systems under and by virtue of the Acts of Congress of August 29, 1916, and of March 21, 1918. The purpose of each act being, as they on their face disclose, to confer such power as a war measure and at the time of taking possession and control, December 28, 1917, the United States was actually engaged in war and the acts are war measures and their validity rests and depends upon the war powers of the government. This is apparent from an inspection of the acts and is so declared by the courts. In *Northern Pacific Railway Company* v. *North Dakota*, 250 U. S. 135, at page 149, the court says:

> "On the face of the statutes it is manifest that they were in terms based upon the war power, *since the authority they gave arose only because of the existence of war,* and the right to exert such authority was to *cease* upon the *war's termination.* To interpret, therefore, the exercise of the power by a presumption of the continuance of a state power limiting and controlling the national authority was but to deny its existence. It was akin to the contention that the supreme right to raise armies and use them in case of war did not extend to directing where and when they should be used."

The Act of August 29, 1916, authorizes the President in time of war "to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same *to the exclusion, as far as may be necessary, of all other traffic thereon,* for the transfer or transportation of troops, war material and equipment, *or such other purposes connected with the emergency as may be needful or desirable.*" This, in effect, makes the United States through its President the sole arbiter of the use of said systems for he, and he alone, is the sole and supreme judge of whether the use or purpose to which the systems are put is "connected with the

emergency". The President and the Director General alone determine whether the use or purpose "connected with the emergency" to which the systems are put, is a purpose or use that is or "may be needful or desirable". His discretion, his judgment in such regard being the sole criterion, his control is absolute. Perfect freedom of action is conferred, except as restrained by his judgment as to what "may be needful or desirable". He is not compelled as a public agent to give "equal treatment to all". Under this grant of power in regard to the act to regulate commerce, he can "set" all "its provisions at naught" as he has done some of its provisions by Order No. 1, dated December 29, of the Director General, wherein it is ordered:

> "The designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may be thus prompted."

This order confers upon "subordinate agencies" the power to abrogate and "set at naught" paragraph 8 of section 15 of the act to regulate commerce wherein the right of selection and determination of routes "in all cases" is conferred on the shipper and compliance with the shippers' designation made mandatory on the carrier. Such a carrier "engaged in Interstate Commerce" is not "subject to the commands of the statute" regulating commerce, and, therefore, falls without the statutory definition of "common carrier, subject to this act."

Again, we have the same result by reason of the authority to exclude, as far as necessary, all traffic other than that directly relating to the war and to give priority to certain shipments, the power thus given being absolute, subject to no regulatory law.

By the Act of March 21, 1918, Congress states that the President had "in time of war taken over the possession, use, control and operation of certain railroads and systems of transportation" and the assumption of such con-

trol is ratified. (Section 1.) The control thus assumed by the President and ratified by Congress was absolute and unhampered by any legislative regulatory measures. In his proclamation of December 26, 1917, the President stated that he takes possession and assumes control of the systems in order that the systems "be utilized for the transportation of troops, war material and equipment to the exclusion, as far as may be necessary, of all other traffic". In and by the proclamation, a Director General was appointed to exercise all the powers of the President under the act. The proclamation retained and asserted the unlimited power conferred by Congress by expressly providing that the Director General might, at any time, by general or special order, change in any respect the existing order of things, and providing that "any orders, general or special, hereafter made by the Director General, shall have paramount authority and be obeyed as such", notwithstanding any existing statute or orders to the contrary.

The first eight sections of the Act of March 21, 1918, provide for the payment of just compensation to the owners of the systems of transportation taken under federal control, and all earnings of the railroads while under federal control are declared to be the property of the United States. Except as modified and restricted by the Act of March 21, 1918, the Act of August 29, 1916, is continued in full force and effect by section 9 of the Act of March 21, 1918, and in addition to the powers conferred on the President by the act, he is given "such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred." It is thus readily seen that the power so conferred upon the President in the control and operation of such systems is absolute and unlimited.

The principal purpose of these acts was to enable the doing by the President of the very things which the Act

to Regulate Commerce and the Elkins Act intended specifically to prohibit the corporate common carriers from doing.

The Act to Regulate Commerce requires the publication and filing of tariffs to be done on thirty days' notice. The Federal Control Act authorizes it to be done whenever the President sees fit, and denies to the Interstate Commerce Commission the right to suspend such. The Elkins Act prohibits preferences and discriminations; the Federal Control Act expressly authorizes the granting of priorities and preferences.

It is a matter of common knowledge that during federal control priority in shipment was accorded the traffic of hundreds of individual shippers, which, if the Interstate Commerce Act was in effect, would have been directly contrary thereto; no one would have the hardihood to claim that the Director General of Railroads (or the President, whose agent he was) would be indictable therefor, and it would be quite as absurd to conclude that though the agents of the sovereign might lawfully give, the recipient would commit a crime in accepting.

It would seem to be clear that the United States was "neither a common carrier" nor "subject to said Act to Regulate Commerce", and consequently not within the language of the Elkins Act. It is not a question whether Congress might have so amended the Act as to bring the obtaining of concessions during federal control within the provisions of Section 10, for instance, of the Interstate Commerce Act, for this it did not do.

As said by this Court in *United States* v. *Bathgate*, 246 U. S. 220, 225:

> "Our concern is not with the power of Congress but with the proper interpretation of an action taken by it. This must be ascertained in view of the settled rule that 'there can be no constructive offenses and before a man can be punished his case must be plainly and unmistak-

> ably within the statute.' (U. S. *v.* Lascher, 134 U. S. 624, 628)."
>
> *McCoy* v. *Pacific Spruce Corpn., 1 Fed. (2d) 853.*

It should also be noted that certain counts are either repugnant or uncertain in the averments of time. Paragraph II of count 65, which is by reference incorporated in counts 66 to 80 and of count 86, which is incorporated in counts 87 to 100, inclusive, each begin with an averment "That on December 28, 1917, *and prior thereto*" certain named railroad companies were common carriers operating through routes and that on that date the President assumed control, exercising it through the Director General and "that throughout the aforesaid period of time" the routes were operated for transportation of gasoline for hire, but all the remaining averments of these counts deal with periods of time *subsequent* to December 28, 1917, instead of prior thereto.

PART III (d).

Special Demurrer. (Assignments of Error IV and CXVIII [5].)

The special demurrer points out that counts numbered 36, 37, 38, 39, 40, 81, 82, 83, 84 and 85, are all double.

These counts charge accepting a concession whereby property was transported at less than the lawful rate and whereby a discrimination was practiced.

The statute provides that

> "it shall be unlawful for any person * * * to accept * * * any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce * * * whereby any such property shall, by any device

whatever, be transported at a less rate than that named in the tariffs published and filed * * * or whereby any other advantage is given or discrimination is practiced."

It is quite clear that the acceptance of a rebate or concession whereby property is transported at less than the lawful rate is one offense, and the acceptance thereof whereby an advantage is given and discrimination practiced is another offense.

Indeed, this same act provides, aside from the criminal penalties, forfeitures to the United States of treble the amount of concessions consisting in departures from the rates, which provision does not apply to concessions merely discriminatory.

A discrimination might occur without any departure from the rates. For example, the cases involving extension of unlimited credit to a particular shipper, discriminatory car distribution, occupancy of land belonging to carriers, and many other forms of discrimination not involving departure from the rate.

On the other hand, a departure from the rate may often occur without any discrimination occurring. It is obvious that before there can be discrimination there must be another shipper shipping contemporaneously. Yet the case may readily be where there is no such other shipper, and although there may be a departure from the rate, there is in such case no discrimination.

Here, however, the vice of duplicity is pointedly present, as the indictment not merely in the charging part charges the two offenses, but in the inducement it lays out both the existence of the tariff rates, from which it is alleged the concession was made, and the fact of another shipper shipping coincidentally. So that by every test the two complete crimes are attempted to be charged in these counts.

United States v. *Norton, 188 Fed. Rep. 256, 259, 261.*

Ammerman v. *United States, 216 Fed. Rep. 326, 329.*
United States v. *Morse, 161 Fed. Rep. 429, 437.*
United States v. *Smith, 152 Fed. Rep. 542, 545, 546.*
United States v. *Taylor, 108 Fed. Rep. 621.*
United States v. *Patty, 2 Fed. Rep. 664.*

PART IV.

Errors Occurring on the Trial.

PART IV (a).

Assignments of Error VI *(Rec., p. 1543)*, denial of defendant's motion to instruct a verdict of acquittal upon the admissions of the Government's opening statement *(Bill of Exceptions, Rec., pp. 170-175)*; LXXXII *(Rec., pp. 1645, 1646)*, denial of defendant's motion at the close of the evidence to instruct a verdict of acquittal *(B. of E., Rec., pp. 899-901)*; CXVII (13, 14 & 15) *(Rec., pp. 1662, 1663)*, denial of motion to set aside the verdict *(B. of E., Rec., pp. 934-947)*; CXVII (5) *(Rec., p. 1665)*, denial of motion in arrest of judgment *(B. of E., Rec., p. 166)*.

It is considered the Court erred in denying these motions, because:

(*1*) It is a scientific fact, of which the court has judicial knowledge, that the liquid condensate of casinghead gas (unblended or blended as shipped to defendant) is not gasoline, but, on the other hand, is appropriately described as unrefined naphtha;

(*2*) The opening statement of the Government admitted, and the undisputed evidence showed, that the material shipped was not gasoline, as alleged in the indictment, but liquid condensate of casinghead gas, resulting in a fatal variance between the charge and the proof;

(*3*) The Government's opening statement and the proof showed a controversy as to the proper construction of tariffs, thus ousting the court of jurisdiction, because jurisdiction to construe tariffs is exclusively confided in the Interstate Commerce Commission under the Act to Regulate Commerce and decisions of this Court thereon.

(1) ***It is a scientific fact, of which the court has judicial knowledge, that the liquid condensate of casinghead gas (unblended or blended as shipped to defendant) is not gasoline, but, on the other hand, is appropriately described as unrefined naphtha.***

Courts take judicial notice of notorious facts concerning commerce, industry, history, natural science and the meaning of words.

> *4 Wigmore on Evidence (2nd ed.), Secs. 2580, 2582.*

Instances of this character are "that natural gas no longer exists in quantities sufficient for heating purposes in Indianapolis" (*State* v. *Indianapolis Gas Co.*, 163 Ind. 48); that Texas cattle fever "is contagious" (*Dorr Cattle Co.* v. *C. H. W. R. Co.*, 128 Ia. 359); sundry facts about the "burning of wool" (*Sun Ins. Office* v. *Western W. M. Co.*, 72 Kan. 41); "explosion of oil" (*Waters-Pierce Oil Co.* v. *Deselms*, 212 U. S. 159); the meaning of "retail liquor dealer" (*State* v. *Nippert*, 74 *Kan.* 371); the meaning of "temperance beer" (*State* v. *Durr*, 69 W. Va. 251); the characteristics of "whiskey, gin, brandy, wine," etc.

> *4 Wigmore on Evidence (2nd ed.), Sec. 2582 and notes.*

The meaning of ordinary words is not a matter for testimony, but rather a matter for the court.

> *3 Wigmore on Evidence (2nd ed.), Sec. 1955 a-1.*

It would be difficult to conceive of a commodity more common in use or in commerce than is gasoline. There is an abundance of testimony in the record, and it is hardly disputed, that gasoline as commonly understood is a liquid suitable for use by vaporization, such as running a motor car, gasoline launches, stoves, etc. Even the Government's own witness lapsed into the expression "ordinary gasoline" to distinguish it from the wider range of material he attempted to embrace within that term (*Rec., p. 447*).

Counsel for the Government in his opening statement was impelled to say to the jury:

> "Now it will be observed that the indictment charges that what was shipped was gasoline. Now as it is a common knowledge there are two kinds of gasoline, that which is usually refined as crude oil in a refinery, and the other is casinghead gasoline made by the compression of gas escaping from an oil well." (*Rec., p. 171*).

There is no pretense whatever that the material shipped is this material commonly known as gasoline. What the Government does claim, however, is that what is ordinarily known as gasoline is only one kind of gasoline, that there are other kinds of gasoline, and that this material is one such other kind; and its experts testified substantially to that effect. On the other hand, the defendant's experts all testified that the application of the name "gasoline" to this material is improper; that in no proper sense of the word "gasoline" would it be embraced, and that the name "casinghead gasoline" does not denote a kind of gasoline, but is a compound name, just as are quicksilver, isinglass, applebutter, nearbeer, etc.

We concede that there are various kinds of gasoline, such as motor gasoline, gas machine gasoline, stove gasoline, etc. The fallacy of the Government's

experts' position however is that they attempt to denominate as a kind within the class gasoline, unfinished gasoline material that is in fact not yet gasoline but destined to become one of the kinds of gasoline embraced within the general class gasoline.

However, all the experts, both the Government's and defendant's, agree that "naphtha" is also a proper name of this material, as well as of the material ordinarily known as gasoline. In fact, Government counsel was ultimately compelled to concede that the material is embraced within the name "naphtha," and one of the Government experts, in an effort to make his testimony consistent, took the position that "gasoline" and "naphtha" were interchangeable names for all the products of the lighter hydrocarbons of petroleum above kerosene, technically known as those embraced within the naphtha fraction (*Rec., pp. 865, 866*).

Under these circumstances, the question resolves itself not into whether "gasoline" or "naphtha" is the proper name, but rather as to the propriety of the term "unrefined" as a prefix to either name.

If the proposition is sound that it is a matter of judicial knowledge that the material in question is unrefined naphtha, the court is of course not controlled by the evidence, but may readily look to it to refresh its knowledge. The position of the Government's experts was that the material could not properly be denominated "unrefined" because they claim that the material was "refined" in the sense in which they use that word as synonymous with "pure," in that they claim it was free of impurities. On the other hand, they admit that it was not finished (at the time of shipment) to the extent gasoline is customarily finished for ordinary consumption. They further admit that it is frequently a practice to send such material to a refinery for finishing, consisting in the correction of its boiling points,

generally done by blending *(Rec., pp. 833, 834, 840, 853, 854, 884-886)*.

The evidence shows beyond controversy that this material was taken to Port Arthur expressly for that purpose, and that every gallon of it was further processed either by blending or distillation. But the Government then shifts to the position that blending is not refining. This then brings the controversy down to the question of the meaning of the words "unrefined" and "refining." If these words are to be construed by their ordinary meaning, it is, as above pointed out, a matter for the court, based on its knowledge of the meaning of words, and not a matter of evidence. If, on the other hand, these words have a special meaning as applied to the petroleum industry, their meaning is properly the subject of evidence. As the District Court declined to take the view that it was a matter of judicial knowledge, the defendant offered evidence by its experts on the meaning of those words as applied to the petroleum industry. The Government failed to qualify any witness as an expert in refining, and consequently the opinions attempted to be expressed by its experts, to the effect that blending is not refining, were not properly admissible. On the other hand, the defendant's experts were qualified on the art of refining, and all of them unhesitatingly said that blending is a very important part of the art of refining; that refining, as applied to the petroleum industry, consists in the separation of the components of crude oil into their various parts, and the production by necessary processes of the finished products thereof. The word "unrefined," in its ordinary sense, denotes a thing that has not been refined, and consequently would undoubtedly embrace this material in that sense. But, in order to meet this meaning of the word, the Government's experts claimed that a process of separation of the

gas from the crude oil had taken place in the earth and that this was a refining process and the only refining process which the material had undergone, and that, in view of its being pure, in the sense of being free of impurities, it needed no further refining. The absurdity of this position is demonstrated by applying this contention to crude oil itself. A crude oil might be absolutely pure, in the sense of being free of impurities, and yet, under their definition of the word "refined," the crude oil would be refined oil. It must be notorious that the principal function of an oil refinery is to convert crude oil into the finished products of it, and the removal of impurities but an incidental process of refining.

It should be observed that the indictment charges that *gasoline* was shipped, and deals with the rates on *gasoline;* but the evidence shows that there also were rates available on unrefined naphtha.

Therefore, if this court judicially knows either (*a*) that the liquid condensate of casinghead gas is properly embraced within the description "unrefined naphtha," or (*b*) that it is properly described by both the word "gasoline" and the words "unrefined naphtha," or (*c*) that it is not the commodity commonly know as gasoline, the case must fall and a verdict should have been ordered for the defendant.

It would seem that as to the last of these propositions, at least, the court must judicially know the fact which is a matter of common knowledge that gasoline as commonly understood is a liquid such as will under ordinary circumstances be suitable for ordinary use in an ordinary motor car or other vaporization use. No pretense was made by the Government to make proof that the material shipped was suitable for other uses than in a motor car, and on this point the evidence overwhelmingly controverts the idea. Leaving aside

all opinions of experts and other witnesses, this fact was proved beyond cavil: that on the tests during the trial conducted jointly by the Government's and defendant's experts it was proven conclusively that under the most favorable circumstances possible the material from the Jenks plant completely failed on both the Packard and Pierce-Arrow cars, and the material from Kiefer completely failed on the Packard car, and there is a conflict of opinion as to how well it worked on the Pierce-Arrow car. Indeed, so adverse did the test develop to the Government's position that it attempted to have stricken from the record all evidence concerning the test after the result was known (Rec., p. 895). Therefore, whether the court knows judicially what the proper name or description of this material is, it is urged that the court at least knows what gasoline is, and the evidence overwhelmingly establishes that this is not the material which the court knows to be gasoline.

(2) The opening statement of the Government admitted, and the undisputed evidence showed, that the material shipped was not gasoline, as alleged in the indictment, but liquid condensate of casinghead gas, resulting in a fatal variance between the charge and the proof.

As previously stated, there has never been any pretense even, on the part of the Government, that the material actually shipped was anything other than the liquid condensate of cashinghead gas, commonly called casinghead gasoline. The indictment, however, does not charge the shipment of *casinghead gasoline*, nor aver the rates applicable to casinghead gasoline, but charges the transportation of *gasoline* and avers the rates applicable to it.

The question here considered is not whether unrefined naphtha is or is not a proper name for casinghead

gasoline, but whether casinghead gasoline and gasoline are identical. The very statement of the proposition refutes the possibility of it. "Gasoline" without prefix of any kind is undoubtedly a word in common use, and commonly understood to apply to a commodity commercially dealt in suitable for use such as the operation of motor cars. There is no pretense that casinghead gasoline is this material. The very use of the prefix "casinghead" distinguishes it as something different. It would be utterly immaterial to the question here considered even if the tariffs published a rate (which they did not) on casinghead gasoline which was the same as the rate contemporaneously published on gasoline. It would, nevertheless, be a fatal variance to charge the transportation of gasoline and prove transportation of casinghead gasoline, as a moment's reflection would demonstrate. There are numerous refined products of petroleum which ordinarily take the same rate, as, for example, gasoline, naphtha and kerosene. It is apparent that if it be permissible to charge the defendant with an alleged offense in relation to transportation of gasoline, and prove instead the transportation of casinghead gasoline, it would be entirely possible to charge in another indictment the same transaction as naphtha, and still another the same transaction as kerosene, and simply prove the one transaction concerning casinghead gasoline and attempt to justify the variance on the ground that the rates were the same. It is clear that in such case the defendant might be indicted over and over for one offense under different descriptions and convicted on each indictment by the same evidence.

A variance which would deprive a defendant of the protection of proving a plea in bar by the record is a fatal variance.

The rule as to pleading an indictment, where property is involved in the offense, is that it must be described specifically and by the name usually appropriate to it,

its common acceptation to govern the description with such degree of certainty as will enable the jury to say whether the property is the same as that upon which the indictment is founded.

1 Wharton's Criminal Procedure (10th ed.), Secs. 254-256.

It is elementary that a description of property in an indictment is material, and that all material averments must be proven as laid.

"It is a positive rule of criminal procedure that the accused shall not be charged with one crime and convicted of another."

6 Encyclopedia of U. S. Supreme Court Reports (Michie), 1909, XVIIA.

The rule as stated by Chief Justice MARSHALL in *The Hoppet,* 7 Cranch 389, 394 (11 U. S. 388, 393), is:

"Is it cured by any evidence showing that, in point of fact, the vessel and cargo are liable to forfeiture? The rule that a man shall not be charged with one crime, and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced. The reasons for this rule are, *1st,* That the party accused may know against what charge to direct his defense. *2nd,* That the court may see with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense. These reasons apply to prosecutions in courts of admiralty with as much force as to prosecutions in other courts. It is, therefore, a maxim of the civil law, that a

> decree must be *secundum allegata* as well as *secundum probata*. It would seem to be a maxim essential to the due administration of justice in all courts."

Instances of variance held fatal in the federal courts are:

In *United States* v. *Denicke*, 35 Fed. Rep. 407, where the indictment described a letter as being addressed to the treasurer of the Travelers Insurance Company, when the proof showed that it was directed to the Traders Insurance Company.

In *United States* v. *Rhodes*, 212 Fed. Rep. 513, an indictment for concealing assets in bankruptcy alleged goods, wares and merchandise, number, kind and quality to the grand jurors unknown, and the evidence showed that the character, kind and description of goods at least to a large extent were known to the grand jury.

In *Feener* v. *United States*, 249 Fed. Rep. 425 (Circuit Court of Appeals for the First Circuit), a similar indictment, where it was held that it was incumbent on the prosecution to show the fact, or a fatal variance would result.

In *Thompson* v. *United States*, 256 Fed. Rep. 616 (Circuit Court of Appeals for the Second Circuit), it was held that where an indictment alleged larceny of property belonging to the United States it was necessary to prove that the property did so belong to the United States, or a fatal variance would result.

In *United States* v. *Phelan*, 250 Fed. Rep. 927, the defendant had pleaded to an indictment a former acquittal, which arose by reason of a variance growing out of misdescription of a written instrument. It was of course held that an acquittal by reason of a variance is not a bar to further prosecution for the substantive crime attempted to be, but not accurately, described in the first indictment; the court saying:

> "The offense described in the present indictment is not the same as that described in the former one, a copy of which is annexed to the defendant's plea." (*p. 927.*)

It is perfectly obvious in the instant case that if the defendant was again indicted for these same transactions on a charge of receiving concessions on shipments of naphtha, and offered a plea of former jeopardy, the court would have to say, just as it did in the case last above cited, that the offense described in the new indictment is not the same as that described in the former one. The mere similarity of dates of shipment, places, etc., would not be sufficient; for like similar data must necessarily have appeared in the *Phelan case*, the only difference being in the description of the instrument.

(3) *The Government's opening statement and the proof show a controversy as to the proper construction of tariffs, thus ousting the court of jurisdiction, because jurisdiction to construe tariffs is exclusively confided to the Interstate Commerce Commission under the Act to Regulate Commerce and decisions of this Court thereon.*

Had the indictment in this case truly pleaded the facts, it would have averred in substance that the material shipped to defendant was liquid condensate of casinghead gas, commonly known as casinghead gasoline (unblended, or blended with naphtha in the proportions of two parts of the casinghead product to one part of the naphtha), that there were no rates published specifically naming this material by those names, but that there were rates published on gasoline; that said rates on gasoline were the proper rates to be applied to the commodity; that the amount of such rates was so much; that there were other lower rates published on unrefined naphtha, but not properly applicable to the commodity;

that nevertheless the commodity was shipped to defendant under the description and upon the rate applicable to unrefined naphtha, and that thereby the defendant procured a concession with respect to the transportation of the commodity. But the Government was very careful, and designedly so, not to plead in the indictment the facts, for the manifest reason that it would be demurrable on its face, under the decision of this Court in the *American Tie & Timber case,* 234 U. S. 138. In that case, the question involved is on all-fours with the question involved here. There had been a rate on cross-ties, which had been cancelled, as a result of which it was contended that, cross-ties being in the nature of lumber, the lumber rates were applicable; and this question was submitted for decision by the courts. The Court, however, pointed out that jurisdiction to construe tariffs was confided exclusively in the Interstate Commerce Commission by the Act to Regulate Commerce, and pointed out the reason why it was essential that such should be the rule, in order to bring about that uniformity of treatment of shippers that it was the fundamental purpose of the Interstate Commerce Act to accomplish, *i. e.,* that if such matters were left to the determination of juries and courts, one jury might find one way, another jury the opposite, a court in one jurisdiction might hold one way and a court in another jurisdiction the opposite, as a consequence of which one shipper would receive one treatment under his decision, and the other a different treatment.

The fact that this prosecution was instigated by the prosecuting arm of the Interstate Commerce Commission should not for a moment be mistaken as implying that it was the construction of the Commission in its judicial capacity that the tariff on gasoline covers this commodity. On the contrary, it simply betokens the unwillingness of the prosecuting branch of the Commission to trust the Commission to decide the matter; but

instead they procure an indictment not disclosing the real controversy, but deliberately designed to conceal it.

This Court has repeatedly upheld the doctrine of the *American Tie & Timber case* since it enunciation, and no case could be imagined wherein the reasoning of that case would make it more applicable than to the instant case.

There are other indictments pending upon this question in the same jurisdiction, and there are civil suits pending in relation to the matter in other jurisdictions. Some of these civil suits are pending in the State of Texas, the laws of which make it a criminal offense to call the material here involved, for the purposes of sale or transportation, by the description gasoline, or gasoline in combination with any other word or words, which would of course embrace casinghead gasoline. It is inconceivable that upon the trial of this same question in those suits in Texas the same result would be reached as was reached upon this indictment. If a question of this kind is open to more than one jurisdiction, the anomaly might readily result that the legal rate applicable to the commodity, under the decisions of the United States District Court for Texas, is unrefined naphtha, while under the decision of the United States District Court for Oklahoma it would be gasoline.

Following is the syllabus of the *American Tie & Timber case* (234 U. S. 138):

> "Whether a class tariff includes a particular commodity is a controversy primarily to be determined by the Interstate Commerce Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the Act to Regulate Commerce.
>
> "The courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Interstate Commerce Commission.

> "Whether cross-ties are or are not lumber and therefore within the tariffs filed for the latter is a question on which there is great diversity of opinion even among the experts upon the subject, and one that should be determined in the first instance by the Interstate Commerce Commission."

In this case, the very question involved is, (*a*) does the gasoline tariff "include the particular commodity" liquid condensate of casinghead gas, or (*b*) whether the liquid condensate of casinghead gas "is or is not" gasoline, "and therefore within the tariffs filed, for the latter is a question on which there is great diversity of opinion even among experts on the subject." Six experts of unassailable standing testified positively for the defendant that it is not. Two experts—and it is worthy of note in this connection that the Government did not call the eminent scientists connected with the Bureau of Mines, but hired outside experts—testified that it was. A situation could not come more squarely within the rule laid down by this Court than this does. It would not do to try to answer this proposition by sweeping aside all the testimony of the defendant's experts and say that the question is too plain for argument. That very contention was made in the *American Tie & Timber case*. It was there argued that the rule of primary jurisdiction in one body was well enough abstractly, but that it ought not to prevail when the reason for it no longer existed, and therefore, ought to have no application there,

> "because it is so plain that oak cross-ties were included in the lumber rate as fixed in the tariff of the Railway Company that there is no reason for proceeding primarily before the Commission, as there is no possibility of difference on the subject if left to the consideration of the courts. We need not pause to point out the palpable error of law which the proposition involves since on the

face of the record it is apparent that the assumption of fact upon which it rests is absolutely without foundation. We say this because nothing could more clearly demonstrate such result than does the conflict and confusion in the testimony concerning whether cross-ties were included in the filed lumber tariff." (*234 U. S. 147.*)

And the court goes on to point out a further demonstration arising from the fact that in the trial of the very same case at the first hearing the trial judge was so clearly of opinion that cross-ties were not lumber that he so charged the jury and directed a verdict.

In this case the trial court even conceded that he considered the question not free from doubt, and intimated that if it was a personal indictment he would not be disposed to submit the question to the jury, but that since it was a corporation the question had better be determined higher up (*Rec., pp. 899-900*). There is of course scant justice in this view, but, to use the expression of this Court in the case above cited, it is "a demonstration" of the fact that there is ambiguity, to put it mildly.

At the conclusion of the evidence the defendant moved a directed verdict, and the following from *pages 899* and *900* of the Record shows the court's impression on the subject:

> "By Mr. Diggs: We will also ask that this case be dismissed by the court for the want of jurisdiction arising from the question that it involves a construction of the tariffs as to whether this commodity included within the meaning of gasoline.
>
> "By the Court: Very well. I do not think that question is free from doubt but when (then) I am going to resolve that in favor of the government so that if the jury brings in an adverse verdict you can get a test but I am not sure about that. Those questions were raised in the demurrer and

wherever there is ambiguity and the question is ambiguity, that itself is not enough to preclude it from being a criminal case. I am not sure about that.

"By Mr. Diggs: I just mentioned that at this time so your honor may consider it in connection.

"By the Court: Very well, I do not think the court ought to do that when a man's liberty is stake. I would not do that if it involved a question of imprisonment. I would give my best judgment but these questions have got to be determined.

"The Court: Is there any special thing you want to bring to the attention of the court? I see you have brought some authorities over here.

"Mr. Diggs: I brought some authorities on the assumption the court wanted us to state our position on the question of jurisdiction.

"The Court: That is the same proposition as argued by demurrer?

"Mr. Swacker: No, sir, because the indictments are not so pleaded that we could raise it on demurrer; the railroads did but we could not.

"The Court: Yes.

"Mr. Swacker: And in the way it was pleaded, we could not argue this——

"The Court: You did—they did do it and I did not examine the pleadings, to see whether they should be, but I reached the conclusion the question ought to be definitely passed on by the Supreme Court of the United States, and I overruled the demurrer.

"Mr. Swacker: The way it is pleaded is that we shipped gasoline and the proof is we shipped casinghead gasoline which it is argued takes the gasoline rate. We think the case ought to be dismissed on the ground of variance, because of the variance between the pleadings and the proof, and the only way this jurisdictional question can be saved is by showing by the proof, because we cannot rely on the pleadings to prove it.

"The Court: What does the variance consist in?

"Mr. Swacker: The indictment charges we shipped gasoline. The proof is undisputed we shipped casinghead gasoline from which the government argues and contends that casinghead gasoline takes the gasoline rate, and if it had been pleaded that way it would have been demurrable on its face, under the *Tie & Timber case,* but not having been pleaded that way, the only way this question can be saved is by calling it to your honor's attention now, and asking an instruction on the variance of the testimony. Now, your honor is confronted with the necessity of trying to construe that tariff.

"The Court: Yes—I will not take it away from the jury on that ground. I will give you an exception to that."

Finally the Interstate Commerce Commission's safe transportation rules afford the best demonstration conceivable of ambiguity in the name of the material. It should be noted that these rules are in no sense rules affecting or determining the description to be used for rate or classification purposes, but are rules merely relating to a description required to be used as a matter of safety.

The rules that were in force during the early part of the period herein involved provided that when the liquid condensate from natural gas or from casinghead gas of petroleum oil wells had a vapor tension exceeding 10 pounds it must be described as liquefied petroleum gas, and shipped in specially constructed tank cars; and that when the condensate, unblended or blended with other products, has a vapor tension not exceeding 10 pounds, and "is shipped as gasoline," it may be shipped in ordinary tank cars; and these rules further provided that the condensate when blended with refinery gasoline or naphtha "may be described and shipped as gasoline" when the vapor tension does not exceed 10 pounds (*Rec., pp. 430-433, 1089, 1090*). And during the balance of the

time these rules, while remaining the same as to material over 10 pounds, provided that when under 10 pounds "it must be described and shipped as gasoline, casinghead gasoline or casinghead naphtha" (*Rec., p. 1159*). After this rule went into force it should be borne in mind that all shipments to defendant, in addition to bearing the description "unrefined naphtha," bore the description "casinghead naphtha," in compliance with this rule, which fact was conceded by the Government.

It should be further noted that in these rules the expression "may be" is used as applied to gasoline, and other similar rules use the expression "must." Furthermore, the word "gasoline" in the "may be" rule is placed in quotation marks by the Commission itself, and the only other instance the safe transportation inspector League was able to find of the use of quotation marks around a name was "strike anywhere" matches. This seems to show rather clearly that the Commission recognized that gasoline was not the true name of the material (*Rec., pp. 432-434*).

PART IV (b).

The evidence received on the theory of admissions by defendant and the Gypsy Oil Company, consisting in a practice of calling liquid condensate of casinghead gas by the appellation "gasoline" at other times and under other circumstances was improperly admitted, and prejudicial.

Assignments of Error VII (*Rec., p. 1544*), Government Exhibit 1 (*Bill of Exceptions, Rec., pp. 951, 952*), showing the fact that the capital stock of both the Gypsy Oil Company and the defendant was owned and controlled by the Gulf Oil Corporation, admitted on the theory of making statements of the Gypsy Oil Company and its employees admissions by the defendant: VIII (*Rec., p.*

1544), the testimony (*B. of E., Rec., pp. 183-196*), and XIII (*Rec., p. 1552*), Government Exhibit 2 (*B. of E., Rec., p. 953*), and the testimony in relation thereto (*B. of E., Rec., pp. 253, 254*) of J. H. Riedeman, a former employee of the Gypsy Oil Company: XII (*Rec., pp. 1550, 1551*), the testimony of the witness Manson, another former employee of the Gypsy Oil Company (*B. of E., Rec., pp. 251-253*), and Government Exhibits 5, 6, 7, 8 and 9 (*B. of E., Rec., pp. 958-966*), showing in substance that previous to the date, *i. e.*, December 2, 1916, when the unrefined naphtha rates became effective, shipments to defendant were described by the Gypsy Oil Company as "gasoline": IX, X and XI (*Rec., pp. 1546-1550*), the testimony of the witness Sweet, superintendent of the Gypsy Oil Company (*B. of E., Rec., pp. 200-230*) in substance to the effect that previous to the date, *i. e.*, December 2, 1916, northbound rates were made effective on crude unfinished naphtha, the blending material shipped north was described as "naphtha," and thereafter as "crude unfinished naphtha"; his testimony in substance that previous to December 2, 1916, the material shipped to Port Arthur was commonly known as "gasoline" and thereafter as "unrefined naphtha"; and his testimony that the same commodity as was shipped to Port Arthur described as "unrefined naphtha" after December 2, 1916, was also shipped to Pittsburgh, Pa., under the description "gasoline," that description being used because there was no similar unrefined naphtha rate published to Pittsburgh and "gasoline" was therefore the only term of description they could have used upon such shipments: XXXI (*Rec., p. 1591*), the evidence (admitted by defendant, subject to objection) while the witness Sanderson, general superintendent of the gasoline department of the Gypsy Oil Company, was on the stand (*B. of E., Rec., pp. 476-483*), in substance as follows: That previous to December 2, 1916, the material shipped to Port Arthur was described as "gasoline"; that at the incep-

tion of the business the casinghead material was blended with naphtha and shipped to northern points to market and described as "gasoline"; that in the early part of 1915 such shipments were discontinued, and thereafter shipments were made until December 2, 1916, to Port Arthur under the description "gasoline," and after December 2, 1916, under the description "unrefined naphtha," and that before and after December 2, 1916, shipments were made to Pittsburgh described as "gasoline," the degree of blend of the material shipped to northern points to market in 1913 and 1914 not however being shown: XXXII (*Rec., pp. 1595, 1596*), the evidence (admitted by defendant, subject to objection) of the witness Hoagland (*B. of E., Rec., pp. 487, 488*) that the material shipped to Pittsburgh was identical with that shipped to Port Arthur taken from the same tank at the same time: XLIV and XLV (*Rec., pp. 1600, 1601*), the testimony of the witness Millard (*B. of E., Rec., pp. 547-558*), a former employee of the Gypsy Oil Company, to the effect that the material shipped previous to December 2, 1916, was billed as "gasoline" and thereafter as "unrefined naphtha," and that the shipments in the earlier years direct to market were also billed as "gasoline," but that this product was different from that shipped to Port Arthur in that it was further blended, more naphtha being used in order to bring it to the gravity specifications ordered: XLIII (*Rec., p. 1600*), Government Exhibit 95 (*B. of E., Rec., pp. 1375, 1376*), and the testimony of the witness Lyon (*B. of E., Rec., pp. 542-547*) showing that the shipments forwarded in 1913 and 1914 direct to market were invoiced and described as "blended gasoline": XIV (*Rec., p. 1553*), the testimony of the witness Weddell (*B. of E., Rec., pp. 276-283*), agent of the delivery carrier, to the effect that he collected charges from defendant previous to December 2, 1916, on shipments billed as "gasoline" at the gasoline rates: XV (*Rec., pp. 1553-1557*), testimony of the witness Timmons (*B. of E., Rec., pp.*

290-323) concerning entries reading "gasoline" made in a book not offered in evidence nor made by the witness, but made by laboratory test boys, whose functions did not include classifying or naming material, but merely consisted in recording the data of physical characteristics developed by tests, and who were not shown to have any duties in anywise relating to shipping: XLII (*Rec., p. 1600*), testimony of same witness (*B. of E., pp. 290-323, 541, 542*) and Government Exhibit 94 (*B. of E., Rec., p. 1369*), XLVIII (*Rec., p. 1601*), Government Exhibits 110 to 119, inclusive (*B. of E., Rec., pp. 1444-1453*), LII and LIII (*Rec., p. 1602*), Government Exhibits 120 to 134, inclusive, and 10 to 14, inclusive, said exhibits being records showing the numbers of the tanks at refinery into which shipments were unloaded, pumping records showing movement of materials between tanks and distillation test records by which it was sought to be established the material was gasoline, or was so called because other distillation tests of the same numbered tanks were entered "gasoline," whereas the testimony showed the fact to be that the tanks in question were used for making gasoline and that the practice was to unload the material shipped into said tanks and there blend it with other material to make gasoline: XXXIII and XXXIV (*Rec., pp. 1596-1598*), being the testimony of the witness Koontz (*B. of E., Rec., pp. 489-496*), a laboratory tester, in substance that he made entries on distillation test sheets in which he characterized the contents of certain tanks as gasoline, whereas it was shown that it was no part of his duty to classify the material but merely to record the indicia of the physical tests; also that instructions were issued about the time the practice of using the description "unrefined naphtha" in shipping arose, to refinery employees to use that description thereafter instead of the description "Kiefer gasoline" theretofore used by them: XXXVIII, XXXIX, XL, XLI (*Rec., pp. 1599, 1600*). Government Exhibits 85 to 93, inclusive (*B. of E., Rec.,*

pp. 1363-1368), being communications between defendant's traffic manager Ellis and officials of the carriers, as follows: January 15, 1914, Ellis to Mr. Powers of Frisco railroad, requesting reduction of gasoline rate from Kiefer to Port Arthur; letter May 29, 1916, from Frisco railroad to Ellis, inquiring if any objection by defendant to cancellation of gasoline rates Oklahoma to Port Arthur; June 5, 1916, reply of Ellis stating does not wish rate cancelled, as it is in daily use; February 9, 1915, Ellis to Frisco railroad and Southern Pacific, requesting further reduction of gasoline and naphtha rates between Kiefer and Port Arthur; March 18, 1915, reply to above declining to make further reduction; January 18, 1914, telegram Ellis to Kansas City Southern railway requesting establishment rate on gasoline for coastwise shipment; January 19, 1914, telegram Ellis to Kansas City Southern railway requesting establishment northbound rate on naphtha; January 19, 1914, letter Ellis to Frisco railroad and Kansas City Southern railway confirming request and explaining that naphtha was being moved northbound to be further refined with products then at Kiefer, and that the outbound shipments from Kiefer would consist of gasoline, of which there would be two cars out for each one of naphtha in; January 19, 1915, letter from Southern Pacific railroad and Frisco railroad to Ellis replying to latter's request for establishment of a 15c rate as a transit proposition, declining to do so on the ground that the material having passed beyond a crude state it would result in disturbing the rate basis applicable to refined oils: XLIX (*Rec., p. 1601*) and LI (*Rec., p. 1602*), being Government Exhibits 68 and 69 (*B. of E., Rec., p. 1290*) and 135 to 138, inclusive (*B. of E., Rec., pp. 1458-1461*), being communications from defendant's traffic manager, Ellis, to W. P. Donovan, superintendent of Gypsy Oil Company, instructing latter over what routes to forward shipments to Port Arthur, and advising him concerning certain safety regulations; this

evidence having been admitted on the theory that it indicated exercise of control over Gypsy Oil Company by defendant: and LXXXI (*Rec., pp. 1640-1645*), denial of motion to strike out all of the foregoing testimony and evidence (*B. of E., Rec., pp. 625-630, 897*).

The theory upon which all this evidence was admitted was that the practice of calling and shipping the material as gasoline (previous to the publication of the rates on unrefined naphtha) by agents and employees of the company, constituted an admission that the material was in fact gasoline. As it so happened, however, that the great bulk of this evidence consisted in declarations by representatives of the Gypsy Oil Company, it was thought to impute their acts to the defendant by showing that the Gypsy Oil Company was controlled by the same corporation that controlled the defendant. It is rather a novelty to constitute a criminal agency solely by reason of intercorporate relationship, and the trial court was rather loath to embrace this doctrine, and admitted the earlier evidence rather on the theory of showing the general course of conduct of the Gypsy Oil Company (the relevancy of which is not apparent). But the Government finally rested its claim to impute to the defendant the acts of the Gypsy Oil Company on the letters (*Exhibits 68, 69, 135-138*) from the traffic manager of the defendant to the superintendent of the Gypsy Oil Company directing the latter over what route to forward shipments and calling his attention to certain safety regulations; contending that they established the *exercise* of control by the defendant over the Gypsy Oil Company.

There is, of course, absolutely no warrant for any such assumption as any purchaser of material might and would very properly write the seller giving him directions as to the route of shipment desired and calling his attention to regulations involved. This, however, is not the important point. The real point is that the admission of this evidence, as admissions, violates the most

elementary factors of the *res inter alios acta* rule. Some of the evidence in question, such as that of the witness Millard (*Rec., pp. 547, 548*), shows that it embraces a different material than that shipped to Port Arthur, namely, the blended gasoline, which was and ought in fact to have been shipped as gasoline. The distillation tests, pump records and unloading records by which the Government sought to make it appear that because tests on certain days of certain numbered tanks bore the description "gasoline," and the unloading records of that day showed certain cars of the casinghead material had been pumped into those tanks, that the casinghead material had been denominated gasoline, whereas the testimony showed that the fact was that the tanks were used to make gasoline and that the casinghead material was put into those tanks in the course of such manufacture, so that the test reading "gasoline" was the finished product resulting from the blending.

Declarations or acts concerning other transactions than those involved, even though by the same party, in order to be receivable as admissions, or indeed to have any evidentiary value, must be declarations or acts done under similar circumstances in all material respects.

Such facts being of course purely collateral, are ordinarily inadmissible because entirely irrelevant. When, however, they tend to show a course of conduct or habit, they may become relevant. In such case, however, it must be a course of conduct or habit in similar situations. Obviously, the shipment of blended gasoline (as that expression has been used in this case) as gasoline affords not the slightest inference of the existence of a habit of shipping something else as gasoline. Again, the shipment of a certain material as gasoline under a classification permitting such description or offering no other choice, has not the slightest probative force to establish that the identical material shipped under an-

other classification permitting of a choice or authorizing the use of a more appropriate designation, is gasoline. It should be understood that the defendant has at no time disputed, but on the contrary freely admitted (subject to exception) throughout the trial, that it had been its practice to ship the identical material and describe it as gasoline *under different circumstances.*

Before the establishment of the unrefined naphtha rates to Port Arthur, and at all times as to Pittsburgh, there were no unrefined naphtha rates or classifications. If, however, the classifications that did exist would permit of the shipment of this particular material under the description of gasoline, *even though it was not in fact the material commonly known as gasoline,* then it is perfectly obvious that the fact of so shipping it could not have the slightest probative force to establish that the material was in fact gasoline. The attitude of the trial court upon the objection to the admission of this class of evidence was that if such was the situation it would be a matter for the defendant to explain, and explanation to the above effect by the defendant would tend to affect the probative value of the evidence offered by the Government. It will readily appear where this rule would lead to, quite apart from shifting the burden of proof to the defendant. It would result in going into the trial of a collateral subject, namely, what during other times than those involved in the indictment, as to Port Arthur, and what as to other places not involved in the indictment, as to Pittsburgh, did the classifications permit with respect to the shipment of this material as gasoline? Upon the trial of such issue, and with the burden improperly upon the defendant, it would be found, for example, that although this material was not the material commonly known as gasoline, yet, by reason of the peculiarity of the classifications naming rates on gasoline it could properly be shipped under that description. The situation would then be that it would be established that

the evidence originally offered of such previous shipment under such other circumstances had no probative force whatever, and it would be necessary that it be stricken out. The mere statement of such procedure shows the impropriety of the practice of admitting the evidence at all in the first instance without the contemporaneous establishment of the fact by the Government that the circumstances were identical (in material respects).

To correctly appraise this evidence it is useful again to consider its character. To be supposed to be relevant at all, it must be assumed to tend to prove that the material shipped to Port Arthur under the description "unrefined naphtha" was in fact gasoline. Obviously, it is not supposed to be direct proof. The idea is that because at other times similar material was described for shipment as gasoline, the inference is that it was gasoline. This on the fact of it is of course a violent disregard of the hearsay rule, because purely extrajudicial, not subject to cross examination, etc. But this defect of it might be curable by an exception to the hearsay rule, if the evidence was of a character relevant to establish an admission, the theory being that if the defendant so characterized the material as gasoline, inferentially it was gasoline, and piling inference on inference that therefore the material shipped to Port Arthur was inferentially gasoline. But the fatal trouble with it is that it starts off with the presumption that the evidence offered is *relevant* towards proving that there was any admission that the material was gasoline.

Professor Wigmore, examining evidence of this character, says:

> "Sec. 32. *Same: With Reference to the Proponent of Evidence.*—* * * Thus, throughout the whole realm of evidence, circumstantial and testimonial, the theory of the inductive argument, as practically applied from the standpoint of ad-

missibility, is that the evidentiary fact will be considered when, and only when, the desired conclusion based upon it is a more probable or natural, or at least a probable or natural, hypothesis, and when the other hypotheses or explanations of the fact, if any, are either less probable or natural, or at least not exceedingly more probable or natural. The degree of strength required will vary with different sorts of evidentiary facts, depending somewhat upon differing views of human experience with those facts, somewhat upon the practical availability of stronger facts, and somewhat upon the hardships of certain inferences in case they should be unfounded. But the general spirit and mode of reasoning of the courts substantially illustrates the dictates of scientific logic.

"Sec. 33. *Same: Occasional Subordinate Tests; Method of Agreement and Method of Difference.*—The main question for the inductive argument being (in the words of Professor Sidgwick, already quoted), 'What certainty can we obtain that the alternative chosen is the right one out of all those conceivable?' there have been stated by scientific logic several subordinate methods or processes of investigation which may be viewed as attempts to answer this question. Usually enumerated as five, they are reducible in essence to two —the Method of Agreement and the Method of Difference. Occasionally they may be and are conveniently resorted to in the testing of judicial evidence.

"(*a*) *Method of Agreement.*—The cannon to which this applies may be thus stated: 'Whatever circumstances can be excluded without excluding the phenomenon whose effect (or cause) is being sought; or can be absent notwithstanding its presence, are not causally connected with it. * * * The remainder, those circumstances which are not eliminated by this process, are supposed to be thus shown to be essential to the phenomenon —to be the proved effect (or cause).' From the point of view of proof, then, when we argue that

the observed instances of *a, viz., a', a'', a'''*, being always followed by *b*, proves *a* to be the cause of *b*, we can avoid the danger of ignoring other causes as the true explanation, by providing that the various instances shall be attended by identically the same circumstances or conditions; then, and then only, when *a*, under identically the same conditions, is followed always by *b*, have we the right to claim that *b* is the effect of *a* and not of some other cause. Applying this method from the standpoint of mere admissibility, we of course do not need to exclude so rigorously the possibility of other explanations; accordingly our test would be whether the evidential instances occurred under substantially similar (not identically the same) conditions, *i. e.*, so that the supposed conclusion is at least the more probable, though not the only possible, explanation. This subordinate test— which is merely a practical aid to the ultimate or fundamental one—will naturally be most available and useful where the evidential fact consists of a supposed parallel instance. To illustrate: *(1)* In showing that a person's illness was due to the eating of certain food, the fact is offered that other persons were ill after eating of the same food. Here the test naturally to be applied is whether the other illnesses occurred under substantially similar conditions of time, surroundings, and symptoms. *(2)* To show that a portion of a pavement caused an injury because dangerous to passers-by, the fact is offered that other persons who passed fell down at that place. Here a similar test is called for. Judicial annals contain a vast variety of instances in which this same subordinate test is the natural one to be applied, and is in practice used by the courts.

"*(b) Method of Difference.*—The canon of this method is: 'If an instance in which the phenomenon under investigation occurs, and an instance in which it does not occur have every circumstance in common save one, that one only occurring in the former; the circumstance in which alone the two

instances differ is the effect, or the cause, or an indispensable part of the cause, of the phenomenon.' As applied to the judicial purposes of admissibility, the test of this argument becomes: In order to prove that x is the cause of b, by the fact that whenever x was present the effect b, b', b'', was found, and that wherever x was not present the different effects c or d were found, the various instances b, b', b'', c and d are admissible if they were substantially similar to each other in all respects except the presence of x.

"This test is of comparatively rare employment in judicial evidence, because it is rare that instances occur which fulfill this requirement, unless where pre-arranged experiments are possible. But so far as the conditions of the case admit the fulfillment of the requirement, the argument may be and is employed. To illustrate: The injury to the paint on the plaintiff's house is attributed by the defendant to sewer-gas; for this purpose, he is allowed to use the fact that 'under conditions and circumstances as nearly as possible like those surrounding the plaintiff's house,' except the presence of the sewer-gas, the injury to paint did not occur.

"The purpose in using both these subordinate tests is always the same general one—to secure a fair probability for the claimed hypothesis, as against and in competition with other possible ones. It is enough to note here that these specific and accepted logical tests are occasionally available and are judicially applied in the admission of litigious evidence."

1 Wigmore on Evidence (2nd ed.), Secs. 32, 33.

"Sec. 442. *Principle of Probative Value (Relevancy)*—The requirements for this process of inference are indicated by the logical principles already examined at the outset (*ante*, Secs. 30-36), and a brief re-statement will be sufficient. There is presented, as the *factum probandum*, a capacity or tendency in X to produce the specific effect B. This means that in the presence of a certain complex of circumstances the introduction of X will result in the occurrence of B; *i. e.*, this alleged

tendency or capacity in X is not an abstract and absolute one, but a limited and specific one, namely, a capacity, under the circumstances in which B occurred, to be followed by B. What X's capacity or tendency under other circumstances might be, is immaterial; the single question is whether there was such a capacity or tendency under the circumstances in hand. In looking elsewhere, therefore, to evidence this specific capacity or tendency by observing the same effect elsewhere, the requirement is that the circumstances elsewhere are the same as in the case in hand. Thus, if elsewhere are found similar results, B′ and B″, accompanying X, it cannot be inferred that they are the result of the alleged tendency of X, unless the other circumstances in those cases were similar to that in issue; because otherwise it cannot be known that some other circumstance, Y or Z, was not the cause of B′ or B″. In other words, unless the circumstances are the same, the door is open for other hypotheses that might account for the effects B′ and B″, as well as for B. Thus, if the proposition is that X factory's vibrations have a tendency to injure an adjacent building B, the falling of timbers in other adjacent houses B′ and B″ might not evidence such a tendency if B′ were an old house and B″ were a wooden house, while B was a new brick house; the case B′ would at most indicate a tendency in X to injure an old house, not a new house B; and the case B″ would at most indicate a tendency in X to injure a wooden house, not a brick house B. Or, again, if in a third house B‴, lying on the other side of X factory and next to Y factory also, there is a similar injury, it cannot be inferred that it is the result of a tendency in X to produce such an injury to B, because the factory Y may have caused, partly or solely, the injury to B‴. The general logical requirement is, then, that when a thing's capacity or tendency to produce an effect of a given sort is to be evidenced by instances of the same effect found attending the same thing elsewhere, these other instances have probative value—*i. e.*, are relevant—to show such

a tendency or capacity *only if the conditions or circumstances in the other instances are similar to those in the case in hand.*

"But this similarity need not be precise in every detail. It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question. For instance, in the case put above, the circumstance that house B′ was of wood while house B was of brick would conceivably affect the ease and likelihood of injury by vibration; but the circumstance that the inner walls in B′ were papered while those in B were kalsomined, or that the house B′ was painted red while the house B was painted green, or that the occupant of house B′ was a Presbyterian while the house B was occupied by a Methodist—such a circumstance, though perhaps material in other aspects, could not have any bearing upon the likelihood of injury by vibration. A similarity between the two cases in respect to such circumstances, therefore, would not be required. The similarity that is required is, in short, a similarity in essential circumstances, or, as it is usually expressed, a *substantial similarity, i. e.,* a similarity in *such circumstances or conditions as might supposably affect the result in question.*

"The logical foundation of this principle has been already set forth in another place (Secs. 30-33). As applied to the present sort of inference it has constantly received the sanction of the courts; and whatever are the inconsistencies of its applications, there is substantial unanimity in the general reasoning:" (Italics his).

Ibid, Sec. 442.

Citing:

Lake Erie & W. R. Co. v. *Mugg, 132 Ind. 168;*

Chicago, St. L. & P. R. Co. v. *Champion, 32 N. E. Rep. 874;*

Emerson v. *Lowell Gaslight Co., 3 Allen 410, 417;*

Hunt v. *Lowell Gaslight Co., 8 Allen 169, 171;*
Baxter v. *Doe, 142 Mass. 558, 561;*
Reeve v. *Dennett, 145 Mass. 23;*
State v. *Justus, 11 Oregon 178;*
Leonard v. *Southern Pacific Co., 21 Oregon. 555, 559.*

In *Cohn* v. *Saidel, 71 N. H. 558, 53 Atl. 800,* the court was concerned with a situation in many respects similar to the evidence here involved. The case was one for malicious prosecution, and the plaintiff sought to show that the defendant had previously instituted another action, which he had after the lapse of time permitted to be nonsuited. The plaintiff's theory was that permitting himself to be nonsuited amounted to an admission by the defendant that he never had a legitimate cause of action. As the court, upon careful consideration of the whole subject of inferences, pointed out, a reasonable inference might be drawn that such was the case and another inference just as reasonable drawn to the contrary, and that consequently the evidence could have no probative force whatever, but would merely lead to collateral inquiries.

In *United State Fidelity & Guaranty Co.* v. *Des Moines National Bank, 145 Fed. Rep. 273,* the court was confronted with substantially the same question, and said:

> "Thus the charge proceeded, upon the view that, while the matter of when and how the loss occurred and what became of the money was not shown but left to conjecture, Kelley's relation to the money, his control over it, and his custody of it, were such that the jury would be justified in inferring that the loss, because not shown to be otherwise, was in some way or other the result of culpable negligence on his part. Essentially the same idea is expressed by counsel for the bank, when they say:
>
> 'We contend that by the manner of procedure in this bank, and the system of accounting in

vogue in this bank, we have shown conclusively that Kelley got the money and can't tell what became of it, and so his bond is liable unless they show what became of it.'

"We cannot concur in that view. It presupposes that the reserve cash was within the control and custody of Kelley, and applies to him the rule applicable to a bailee or other custodian whose situation is such that a loss, if not otherwise explained, warrants the inference that it was due to his negligence or dishonesty. Kelley occupied no such relation to this money. He could take from it to replenish the counter cash and add to it from the latter, and it was his duty to count it at the close of business each day, and then to lock the safe; but, in other respects, it was not within his control or custody. It was the cashier, and not Kelley, who carried the combination to the lock, who could say whether the reserve chest should be kept locked or unlocked during business hours, and who could otherwise take measures for the safety of the money. When Kelley was attending to his important duties in the paying teller's cage, as was required most of the time, the reserve chest and its contents were beyond the range of his observation, the chest was unlocked, and its contents were easily accessible to other employes, over whom he had no control, and who were passing in and out of the vault, and sometimes out of the bank, without any immediate supervision of their movements. True they had no right to disturb the money, but that was not an assurance that none of them would yield to the temptation which the situation presented; nor does the presumption of innocence, which would protect them from the charge of theft in the absence of satisfactory evidence thereof, warrant the inference that Kelley was either negligent or dishonest. *Smith* v. *First National Bank,* 99 Mass. 605, 97 Am. Dec. 59. Such an inference cannot be legitimately drawn from a rebutable presumption, but only from premises which are certain.

United States v. *Ross*, 92 U. S. 281, 23 L. ed. 707; *Manning* v. *Insurance Co.*, 100 U. S. 693, 25 L. ed. 761; *Looney* v. *Metropolitan R. R. Co.*, (U. S.) 26 Sup. Ct. 303, 50 L. ed. . . . ; *Globe Accident Ins. Co.* v. *Gerisch*, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486; *Chicago etc. Ry. Co.* v. *Rhoades*, 64 Kan. 553, 68 Pac. 58.

"Passing, for the moment, the fact that Kelley neglected to make a daily count of the money in the reserve chest, it is plain that the evidence bearing upon the cause or occasion of the loss was altogether circumstantial, and was as consistent with the theory that the loss was occasioned solely by the personal dishonesty of one of the other employes, to whom the money in its exposed condition was easily accessible, as with the theory that it was occasioned by the personal dishonesty or culpable negligence of Kelley. Which theory was correct was left to mere conjecture. The bank had the burden of proof, and, as it failed to produce any evidence reasonably tending to establish the latter theory to the exclusion of the other, the guaranty company was entitled to a directed verdict in its favor. *Asbach* v. *Chicago etc. Ry. Co.*, 74 Iowa 248, 37 N. W. 182; *Smith* v. *First National Bank*, 99 Mass. 605, 97 Am. Dec. 59; *Crafts* v. *Boston*, 109 Mass. 519; *Morley* v. *Eastern Express Co.*, 116 Mass. 97; *Searles* v. *Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; *Ruppert* v. *Brooklyn Heights R. R. Co.*, 154 N. Y. 90, 47 N. E. 971; *Chicago etc. Ry. Co.* v. *Rhoades*, 64 Kan. 553, 68 Pac. 58. As was well said by the Supreme Court of Iowa in *Asbach* v. *Chicago etc. Ry. Co.:*

> 'A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory.'

"The case of *Smith* v. *First National Bank* is well in point. It was an action to recover the value of bonds deposited with the bank for safe-keeping and alleged to have been lost through its negligence. There was no evidence of negligence, except that which resulted by inference from the fact of loss, and the surrounding circumstances were such as to leave it equally open to inference that the bonds had been stolen by one of several persons who had access to the vault in which the bonds were kept. For a loss in the latter mode the bank was not responsible. The court, after observing that the plaintiff had the burden of proof, and that its evidence failed to exclude the possibility of loss by other means than negligence of the defendant, and left the case to be decided by mere inference, without any facts to determine which inference was correct, said:

'There being several inferences deducible from the facts, the plaintiff had not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is essentially wrong.'" (*pp. 278-280.*)

See, also:

Bird v. *United States, 180 U. S. 356, 359;*
Barney v. *Rickard, 157 U. S. 352, 367;*
Thompson v. *Bowie, 4 Wall. 463, 471;*
United States v. *Ross, 92 U. S. 281;*
Hall v. *United States, 150 U. S. 76, 81;*
United States v. *Baxter, 46 Fed. Rep. 350.*

The admission of such evidence could not but seriously prejudice the defendant, and when, as here, it was allowed to be piled up cumulatively by witness after witness, it was bound to exert an extremely prejudicial effect.

PART IV (c).

The evidence as to the practice of certain other concerns unconnected with defendant, of calling or describing as "gasoline" material shipped or produced by them, said material in some instances shown to have been different from, and in other instances not shown to be of the same character as, that shipped to defendant, and the material circumstances surrounding such description being expressly shown in some cases to have been different from, and in no case shown to be the same as, those surrounding the shipments to defendant, was inadmissible for the purpose for which admitted, *i. e.*, of proving the proper name of the commodity shipped to defendant; and it was not competent to establish a custom by showing individual instances.

This evidence is the subject of the following assignments of error: XVIII (*Rec., pp. 1569-1577*) testimony of the witness Haigh (*Bill of Exceptions, Rec., pp. 394-408*), Superintendent of the Ajax Gasoline plant, that he considered and shipped the material produced by his plant as "gasoline," it in fact being blended down to a gravity of 56 to 58 degrees, the proportions being one of the casinghead to three of naptha (just the opposite of the Gypsy Company blend), and the product a finished gasoline shipped direct to market: XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI (*Rec., pp. 1577-1587*), testimony of the witness League, a carrier Bureau of Explosives Inspector (*B. of E., Rec., pp. 408-456*), in substance, that the material shipped by the Gypsy Oil Company was the same both before and after December 2, 1916, and was called by the superintendent of the Gypsy Com-

pany "casinghead gasoline" (*Rec., pp. 408-418*), the witness not being shown to be qualified to know whether the material was the same; that Chestnut & Smith (unconnected with defendant) manufactured a blend of raw casinghead and naphtha which they described and shipped as "gasoline" (*Rec., pp. 421-424*); that D. W. Franchot (also unconnected with defendant) did likewise (*Rec., pp. 425-426*); that the Totem Gasoline Co., Oil States, Ajax, Tribes, Eagle, Consumers, Victor, Tidal, Ohio Cities and Gilliland Gasoline Companies (all unconnected with defendant) did likewise (*Rec., pp. 426-428*), although he could not say the degree of blending or proportions in any instance, but knew there was very wide diversity in that respect, the proportions of blending material involved running all the way from 25% to 95%, and some of it being shipped direct to market for consumption, although the raw casinghead was generally shipped to refiners to be blended; that although the safety rules and tariffs required raw casinghead of over 10 pounds vapor tension to be called "liquefied petroleum gas," no distinction was made by these people (other than in shipping), it being commonly called "gasoline" by them, although "liquefied petroleum gas" is a most accurate name; and when these people attempt to speak accurately about a blended product they do not call it just "gasoline," but use some prefix such as "naphtha blend," "kerosene blend," "blended gasoline," etc.; that he has tested "ordinary gasoline," such as is commonly sold for consumption, and found its vapor tension to range from 1 to 7 pounds (the latter being quite unusual) (*Rec., pp. 441-448*), whereas material shipped by the Gypsy Company had a vapor tension of 6 to 10 pounds (*Rec., pp. 415, 450-454*), and in all of the cases testified to by him it was not shown that there were any rates in effect on unrefined naphtha, making possible the use of that description or any description but "gasoline" (*Rec., pp.*

448-450); and his testimony that in calling the unblended casinghead "raw casinghead" he did not mean to intimate that it was in a crude or unrefined state (*Rec., p. 451*), his previous testimony having been as to the use of the term by others engaged in the business (*Rec., p. 435*), not by himself, and he not being qualified to express an opinion (*Rec., p. 453*): XXVII (*Rec., pp. 1587, 1588*), the testimony of the witness Scott (*B. of E., Rec., pp. 456-461*), another safety inspector, in substance, that at several plants he had inspected it was the custom to call blended material produced by them "gasoline," some blends being kerosene and others naphtha blends; there being no showing whatever of similarity of these blends to the Gypsy Company's blend, and it being further shown that his contact with such parties was limited to their shipping relations, and there being no showing that there were "unrefined naphtha" rates available, or any other than "gasoline" rates: XXVIII (*Rec., p. 1588*), testimony of witness Barnhardt (*B. of E., Rec., pp. 461-465*) that D. W. Franchot, with whom he was connected, was accustomed to ship his product as "gasoline"; it not being shown to be identical with that shipped by the Gypsy Company, and there being no showing of any choice of rate descriptions being available: L (*Rec., p. 1602*), the testimony of the witness Freeman (*B. of E., Rec., pp. 615-618*) of the Carter Oil Co., that tops shipped by it from Carterco, Okla., to Baton Rouge, La., under the description "crude unfinished naphtha," were produced by a skimming plant, whereas his testimony showed that this description was not limited to products of skimming plants; and LXXXI (*Rec., pp. 1640-1645*), denial of motion to strike out all of the foregoing evidence (*B. of E., Rec., pp. 625-630, 897*).

The admission of this evidence constituted an even more violent disregard of the fundamental principles of the rule under which evidence of *res inter alios acta* may

be admitted, for the reason that this evidence related not to defendant's course of conduct at other times and under other circumstances, but to the conduct of *third persons* at other times and under vitally different material circumstances in many respects. Generally speaking, the acts and declarations of strangers to the transactions under inquiry are not admissible at all, *first* because they are pure hearsay, and *second*, because they are even more remotely collateral than those of the defendant. They, of course, could not bind the defendant as admissions, and the only probative force they could have would be to attempt to establish a fact by showing a general custom. An exception therefore is made to the rule against the admission of declarations or acts of third persons, to the extent that where the material circumstances involved are substantially similar they might have a tendency to establish the existence of a certain state of affairs. In this case, however, the evidence was offered on the theory of establishing a custom in the business of calling the material in question gasoline. It is not competent, however, to attempt to establish a general custom by showing individual instances. As was pointed out on the trial, the Government might call twenty witnesses to prove that they individually called the material gasoline; the defendant might in turn call fifty witnesses to prove that they individually did not, and the trial drag on to the end of the court's patience as to numbers of witnesses without having established anything warranting a reasonable inference. If, for example, there were 1,000 people engaged in the industry, and the Government called 20 witnesses, as above suggested, the defendant 50, and the Government 30 more on rebuttal, there would be the evidence of but ten per cent of the industry, and that equally divided, and no basis whatever laid for any conclusion as to what the general custom was.

Wholly apart from this objection, a mere review of the evidence shows that as to none of it was identity of material circumstances established, but as to much of it cross-examination, and in some instances the direct examination, established that the material circumstances were in fact vitally different. Take, for example, the testimony of the witness Haigh, to the effect that the material produced and shipped by his plant was shipped as gasoline. The evidence shows that it was an entirely different material from that shipped to defendant, that it had been blended down to a gravtiy of 56 to 58 degrees by using three parts of naphtha to one of casinghead material—just the opposite to that shipped to defendant—and which made the material one substantially similar to that originally produced by defendant called blended gasoline, and which it is conceded ought to have been shipped and classified as gasoline. His testimony further shows that it was a finished gasoline and was shipped direct to market. Such evidence, therefore, could not have the slightest tendency to establish either that the material shipped to defendant was gasoline or that there was any custom so to consider it.

As to the witness League's testimony, to the effect that a number of plants named by him were accustomed to shipping their product as gasoline, it showed that he could not state the degree of blending or the proportions in any instance, but knew there was a wide diversity in that respect, the proportions of blending material involved running all the way from 25% to 95%, and some of it being shipped direct to market for consumption. It is clear that among the materials embraced in his testimony there was undoubtedly much that ought to have been considered gasoline; and his testimony further discloses that the material shipped by the Gypsy Oil Company had a vapor tension of 6 to 10 pounds, whereas "ordinary gasoline" (his expression) has a vapor ten-

sion ranging from 1 to 7 pounds, the latter however being quite unusual.

The same is true of the testimony of the witnesses Scott and Barnhardt; and in all the cases covered by these exceptions there was no showing in any instance of the existence of any unrefined naptha rates which might have been used.

On apparently the same theory the witness Freeman was permitted to testify that the material shipped by his company as crude unfinished naptha was the product of a skimming plant, supposedly to establish that that name was applicable only to the product of a skimming plant. Yet his cross examination showed that the name was not so limited, but that the operation of a skimming plant was but one method of producing the material which might properly be designated by the name "unfinished naptha."

The only respect in which this testimony showed any similarity of circumstances (in connection with the business of these third parties to that of the defendant) was that the material was produced in each case by a casinghead plant. As was shown, however, by the testimony of several witnesses—and it is a fact as to which there is no possibility of dispute—casinghead product may enter into finished gasoline to the extent of anywhere from 5% to 30%. Under these circumstances, it would have been just as reasonable to have admitted evidence of the shipment of ordinary finished commercial gasoline under the name of gasoline, by any third party, anywhere in the United States, as evidence of the existence of a custom of calling casinghead product gasoline. And it must be remembered that the only theory of establishing such an alleged custom was that if there was such a custom it indicated that the material was gasoline. Of course, if the material were in fact not gasoline, it would be utterly irrelevant that there might be a universal custom to so

call it. If the shoe were on the other foot, if, for illustration, the material were indubitably unrefined naphtha, and suppose unrefined naphtha rates were higher than gasoline rates, and suppose further that a defendant was indicted for shipping the material as gasoline, the Government, and particularly the Interstate Commerce Commission, would be the first to object to the defendant even attempting to show any custom of calling the material gasoline. And unquestionably the defendant would not be entitled to show any such fact in a civil case wherein was involved the determination of what rate was legally applicable; and even in a criminal case the evidence could be admitted on behalf of the defendant only on a question of intent, and not at all to negative the fact that the unrefined naphtha rate was legally applicable.

In connection with the evidence herein discussed, consideration should be given to that discussed under subdivision (i) of this Part (*post 183*), which was rejected by the court when offered by the defendant as evidence, although it was of a much higher character and negatived the existence of a general custom to consider the material involved as gasoline.

It is difficult to understand upon what assumption the Government should have been allowed to introduce evidence of this class, and the defendant denied opportunity to meet it with evidence of the same general class but of much better quality. One such piece of evidence tendered by the defendant, and rejected, was a statute of Texas making it a crime to describe this material as gasoline, for purposes of shipment or sale. And the only explanation of the court's course in rejecting that evidence was the suggestion by him that the statute might have been passed at defendant's instance. While, of course, such was not the case, it is perfectly apparent that if it had been, and that fact made it objectionable or qualified it in any way, it would have been open to the Government to so prove.

The authorities cited under the preceding subdivision are all not only directly in point as to the evidence here under consideration, but the evidence is more definitely inadmissible for the reason that being declarations of others not connected with defendant, they do not come within the exception to the hearsay rule that would apply to admissions of a party.

On the theory of proving a custom or usage, they fail in substantially every particular. While it is rather a novelty to attempt to bind a defendant in a criminal prosecuton by usage, still it must be that the rules applicable to proof of usage in criminal cases can certainly be no less strict than in civil cases.

To prove a custom or usage, it must be shown to be certain and uniform to be binding.

12 Cyc. 1035.

It must be shown to be consistent, for if it appears that there are contradictory usages they destroy each other as such.

Ibid., 1037.

It must be shown that the party sought to be bound had knowledge of the usage.

Ibid., 1039.

The evidence to establish it must not be of isolated instances but must be general and must be known.

Ibid., 1040-1043.

When a word has been defined by statute, custom or usage become void.

Ibid., 1055.

When words of a statute are ambiguous, then only can usage be resorted to to determine their meaning.

Ibid., 1058, 1059.

While words are to be construed according to their plain, ordinary and popular meaning, yet if in particular situations, they have acquired by usage a different meaning, evidence may be taken to show such special meaning, and it may also be taken to show the meaning of technical words or words peculiar to sciences or arts or particular trades, or to determine the meaning of ambiguous words.

Ibid., 1081.

If it be assumed for the moment that it would have been competent in this case to have attempted to show a usage to the effect that the material involved was called gasoline (which, for the reasons later shown, it would not be), it is submitted that the evidence involved fails to meet every one of the necessary attributes of proof of usage. It fails to show that it is certain or uniform. On the contrary, it shows great uncertainty and lack of uniformity.

The witnesses conceded that there were also used numerous other names, such as casinghead gasoline, raw casinghead, naphtha blend, kerosene blend, etc.

The evidence is not consistent, but directly contradictory. It shows that in many thousands of instances the defendant was accumtomed to using the description "unrefined naphtha." There is no more ground for imputing usage to the course of others than to the course of defendant. There is just as much ground for asserting, based on the course of defendant, that the usage is to call the material "unrefined naphtha," as to assert the opposite.

There was no showing whatever of a knowledge of the defendant of such usage of others which would be necessary in order to bind it.

The evidence is not of a general custom common to the locality, common to the trade, or common in any respect, but is simply of individual instances. It is perfectly clear that evidence of such a character can establish nothing on the point of usage.

It fails again in the light of the Texas and Oklahoma statutes (the very locality involved), in that those statutes, in defining the word "gasoline" so as to exclude this material, have established a rule of law that would render void any supposed usage if sought to be offered to construe a contract. Surely, if in a civil case involving a contract for the sale of gasoline the proponent took the position here taken by the Government, in effect that he could deliver this material as gasoline, and offered proof of usage to the effect that this materal was called gasoline, and such showing was of a usage directly contrary to the statutes of the states involved, it is obvious that he would not be permitted to make it.

The foregoing discussion, however, demonstrates the utter impropriety of attempting to prove the fact in issue by attempting to show a usage. If usage would decide the question, then defendant's usage being the only one in which the circumstances were identical, would be absolutely controlling and conclusive against the Government.

Under some circumstances it might be competent to attempt to draw an inference circumstantially that a certain material was gasoline from the fact of a usage to so call it; but, in a case of this kind, where the very question itself is *regardless of usage what is the material,* usage would be utterly irrelevant.

As previously pointed out, the published rates and descriptions *are the binding legal* rates and descriptions, and all the custom in the world would not permit a variance from them.

Assume, for example, that there was a classification on rum and another classification naming higher rates on whiskey. Now, it is a notorious fact, of which judicial notice has been taken, that there is a common usage to embrace rum, whiskey and gin under the one appellation "rum." Yet, a defendant who might under such circumstances have shipped whiskey under the description "rum," in order to procure transportation at the lower rate, would not even be heard to contend that he was entitled to do so, based on the common application of the appellation "rum" to whiskey. The reason is perfectly apparent, and it demonstrates why all the evidence of shipment as gasoline, where there were no unrefined naphtha rates in force, was improper. It is because of the surrounding *material circumstances.* In many situations, proof of common usage to call whiskey "rum" would be perfectly proper. But, where it is the essence of the case as to whether or not the material was in fact rum or whiskey, obviously such usage would be entirely irrelevant.

This brings us back to the subject considered under subdivision (a) hereof. *First,* if the word "gasoline," as used in the tariffs, is a common, ordinary, unambiguous word, it was then the duty of the court to construe it and instruct the jury, and was not the subject of evidence; and it is not competent to show a usage concerning common, ordinary, unambiguous words. *Second,* if on the contrary, as used in the tariffs, "gasoline" is not a common, ordinary, unambiguous word, but one having a technical, scientific or special trade application, then, while it would ordinarily be competent for the court to take proof of usage to establish such meaning, *it would not be in cases of this character, because* jurisdiction for the purpose of producing uniformity is confided exclusively in the Interstate Commerce Commission, as pointed out by this Court in the *American Tie & Timber case,* as shown in subdivision (a) hereof.

PART IV (d).

Evidence that the Texas Company paid gasoline rates on certain shipments to it was not competent to prove an unlawful discrimination in favor of defendant; and refusal of the court to allow defendant to show that the Texas Company subsequently sued to recover excess of gasoline rate over unrefined naphtha rate was highly prejudicial.

Assignments of error as follows, cover this evidence: XVI (*Rec., p. 1558*), the testimony of the witness Anderson (*Bill of Exceptions, Rec., pp. 327-339*) and Government Exhibits 22 to 25, inclusive (*B. of E., Rec., pp. 972-978*) being shipping orders covering shipments to the Texas Company described as "gasoline," said Anderson being superintendent of the Totem Gasoline Company, and testified that his company had shipped material which he said was "blended gasoline" (*Rec., p. 332*), using the description "gasoline" in shipping to the Texas Company, it not being shown whether the material shipped was of the same degree of blend as that shipped by the Gypsy Company, and not shown that the witness knew of the existence of "unrefined naphtha" rates: XVII (*Rec., pp. 1564-1569*), testimony of the witness McCarroll (*B. of E., Rec., pp. 340-345*), superintendent for Crosby & Gillespie, to the effect that a blend of casinghead and naphtha shipped by them to the Texas Company was described as "gasoline"; LXIX (*Rec., p. 1625*), refusal of the court to permit defendant to introduce evidence showing that the Texas Company subsequently sued to recover excess of gasoline rates over "unrefined naphtha" rates on the ground that the latter was applicable, Exhibit 142 for identification (*B. of E., Rec., pp. 1463-1469;* and *Rec., pp. 785-787*): LXXX (*Rec., p. 1638*), denial of motion (*B. of E., Rec., p. 627*) to strike from the record evidence (admitted by defendant, subject to exception)

(*Rec., pp. 625-630, 897*) to the effect that certain shipments of casinghead blended with about one-third naphtha were made to the Texas Company, upon which it paid gasoline rates as described in the shipping orders (*B. of E., Rec., p. 382*).

The 36th to 40th counts, inclusive, and 81st to 85th counts, inclusive, of the indictment attempt to charge the acceptance of a concession whereby property was transported at less than the lawful rate and whereby a discrimination was practiced in favor of the defendant and against the Texas Company.

It is obvious that there might be either a discrimination against the Texas Company or a discrimination in favor of defendant. It is perfectly clear that a discrimination against the Texas Company is not a thing for which defendant could be indicted upon the theory of a discrimination in favor of the defendant. If, for example, the lawful tariff rate applicable was the rate on unrefined naphtha which defendant paid, it would be utterly immaterial in this case, and the defendant could not be charged with fault, if the Texas Company paid the gasoline rate and thus was overcharged. There is not a shred of evidence to show that the defendant knew anything about the Texas Company's affairs or in any way sought to induce the carriers to prefer it as against the Texas Company. The evidence shows, however, that the Texas Company did receive several shipments of apparently similar material at its refinery at Port Arthur, which had been billed and described by the shipper, itself in some cases, as gasoline and upon which the gasoline rate was assessed. There was not the slightest evidence however offered by the Government indicating that the Texas Company knew of the existence of the unrefined naphtha rates, from which it might be inferred therefore that it had chosen the gasoline rate as being the applicable description. On the other hand, the defendant offered to prove (*Ex. 142 for Id., Rec., p. 1463*), but was denied per-

mission to do so, that the Texas Company, after having paid the gasoline rate on the shipments involved, instituted suit against the carriers for the recovery of the excess of the gasoline rate over the unrefined naphtha rate. While one count of the Texas Company's suit rests on the ground that it had been discriminated against, the other count does not rest on such ground, but squarely on the ground that the unrefined naphtha rates are the only rates properly applicable and that it, the Texas Company, had been overcharged, (*Rec., pp. 1467, 1468*).

While it is conceded that evidence concerning what the Texas Company paid under like circumstances would be admissible upon the charge of discrimination, *provided* it was established that defendant had been accorded less than the legal rate, and the Texas Company assessed the legal rate, still in the absence of such proof, the admission of that evidence simply begs the whole question. It of course could not tend to establish the fact as to which rate is legally applicable. That is of course a legal conclusion. The only thing it can be assumed to attempt to establish would be that the material was gasoline. When, however, it appeared that the Texas Company had, unconscious of its rights, mistakenly described the material as gasoline, and paid charges at gasoline rates, the fact that it had done so loses all probative force toward establishing that the material was in fact gasoline.

Apart, therefore, from the question of the propriety of admitting the evidence in the first instance as to what the Texas Company had done, it is apparent that the exclusion of evidence offered by defendant tending completely to negative and explain away any inference which might have been drawn from its previous course, was most highly prejudicial, unjust and unfair to defendant. It is difficult to conceive of anything that would more completely destroy any inference that the material in fact was gasoline drawn from the fact that the Texas

Company had described it as gasoline and paid the rates applicable thereto on it, than the fact that the Texas Company was now prosecuting a suit against the Director General for the recovery of the difference between the unrefined naphtha rate and gasoline rate, on the ground that the material was in fact unrefined naphtha and entitled to move on the unrefined naphtha rate.

This evidence should have been admitted for the further reason that in view of the court's having admitted the evidence upon the theory of showing a usage, discussed in the preceding subdivision, this evidence would be directly relevant to rebut any such supposed usage, because here it is the *sworn statement* of one of the concerns whose practice had been cited towards establishing such usage, to the effect that said practice had been followed through error, and asserting that it was not only not correct, but, in addition to this, directly and assertively contradicting the inference sought to be implied from the supposed usage.

Where evidence of the character discussed in subdivisions (b) and (c) hereof has been admitted, even without objection as to its relevancy, it is generally held error to deny the right to the opposing party to show the same character of evidence; and where it is admitted over objection, as was the case here, it is universally held error to deny the opponent the privilege of showing the same character of evidence.

1 Wigmore on Evidence (2nd ed.), Secs. 34, 35, 36.

PART IV (e).

Evidence that certain witnesses had operated automobiles with insufficiently identified materials, admitted as tending to show that proper name of material shipped to defendant was gasoline, was incompetent and prejudicial.

This evidence is the subject of the following Assignments of Error: LVI *(Rec., pp. 1605-1609)*, testimony of the witness Downing *(Bill of Exceptions, Rec., pp. 810-814)*, manager for Crosby & Gillespie, that he used the product of their casinghead plant to run his car, the material not being shown to be similar even to that shipped to defendant, and the witness being unable to give even the gravity of it: LVIII, LIX *(Rec., pp. 1612-1615)*, testimony of witness Dykema *(B. of E., Rec., pp. 830, 831)*, an expert called by the Government, that in his opinion a material even lighter than one he used the night before would run a car *(Rec., pp. 825-827)*; the testimony of the same witness that the "product from the compression of natural gas" is commonly known as gasoline *(B. of E., Rec., p. 840)*; LX *(Rec., pp. 1615, 1616)*, the testimony of the witness DeBar *(B. of E., Rec., p. 882)*, another Government expert, to the effect that he had run cars several hundred miles on casinghead material, not identified as being even similar to that shipped defendant, and some shown to be in fact different and other to have come from a different locality; and LXXXI *(Rec., pp. 1640-1645)*, motion to strike out the foregoing evidence *(B. of E., Rec., pp. 625-630, 897)*.

This evidence is substantially similar in character to that discussed under subdivision (c) of this Part, and as it is subject to the same criticisms and governed by the same authorities, it will not be discussed at length.

Three witnesses were permitted to testify in substance that they had operated motor cars on material a portion or all of which was casinghead product. No attempt was made however to identify the character of the material as being identical with or even substantially similar to that shipped to defendant.

This evidence, however, is subject to further objection as well. It was a purely collateral question as to whether some other casinghead material might or might not run a car. The only thing that was in issue grew out of the definition of all the witnesses for the defense of gasoline as being a material suitable for use in running a motor car under ordinary circumstances. It is not a corollary to this that any material that would under any circumstances propel a motor car is gasoline. On the contrary, the evidence of more than one witness showed that they had personally known of instances of crude oil actually running a motor car. Of course, no one had the temerity to claim that crude oil was gasoline.

The witness DeBar, who was permitted to testify that he had run cars several hundred miles on casinghead material procured from other localities, and not identified as being even similar to that in issue, showed on cross examination that while it was possible for an expert like himself to use the material, it was not suitable for the "common people" to use, and that he was not willing to trust his wife to use it. It is apparent therefore that his testimony could have no value whatever towards attempting to establish that the material shipped to defendant was gasoline, *first*, because the material he was talking about was not necessarily the same material as that shipped to defendant, and *second*, that it did not tend in the slightest to indicate that the material came within the definition "gasoline" above mentioned, but, on the contrary, expressly showed that it was not a suitable material for ordinary use.

This evidence again illustrates the impropriety of attempting to prove a custom by individual instances. Here were three witnesses, two of them offered as experts, and the third from his occupation apparently expert in the handling of the material, so that even if it were assumed that the material used by them was identical with that shipped, the mere fact that they, experts, had been able to use it to propel a car could have no probative force whatever to establish that it was suitable for ordinary use. And, as above pointed out, it was conceded by one of them that his ability to use it depended upon the fact of his being an expert, and that it was not suitable for ordinary use.

PART IV (f).

Admission, over objection for lack of proper foundation, of testimony as to an alleged test by a Government expert, which was subsequently shown to have been a false test, was highly prejudicial even though subsequently stricken out.

Assignments of Error LV and LVII (*Rec., pp. 1602-1605, 1609*). During the trial one of the Government experts, W. P. Dykema, accompanied by other Government witnesses, but not by any one connected with the defense, attempted to make a test to demonstrate that raw casinghead would run an automobile without difficulty. He proceeded to the town of Jenks, and procured from a casinghead plant adjacent to one of the Gypsy Company's, a quantity of raw casinghead, which he placed in the car. The witness Moss, an attendant at the casinghead plant, was permitted to testify that he furnished the material, saw it placed in the car, and saw the car driven off, in the face of objection to his testimony on the ground that he was unable to say definitely whether or not Dykema had drained the reserve tank of the car (*Rec.,*

pp. 807-810); and, following him, Dykema was permitted to testify (*Rec., pp. 824-828*) that he used the material procured at that plant and drove the car into Tulsa from Jenks upon it without difficulty. This in the face of insistent objection upon the ground that there was no proper foundation for his testimony, in that he himself, on preliminary cross examination, admitted that he did not know whether or not he had completely drained the car, and that he did not know whether the car had a reserve tank, and that if it had he of course had not drained it (*B. of E., Rec., pp. 824-828*).

The defendant fortunately was able subsequently to find and produce the chauffeur of the car used in the alleged test, and to prove that the car did in fact have a reserve tank, which was not drained, as a result of which the actual fact was the car was propelled by the ordinary gasoline instead of the casinghead product (*Rec., pp. 892, 896*).

While the court thereupon struck out Dykeman's testimony, its admission, in the face of the preliminary cross examination showing that the witness would manifestly be incapable of giving honest testimony on the subject, was clearly an abuse of discretion, and it was highly prejudicial to the defendant, because, by reason of the manner in which the court cross examined the chauffeur, the jury could not help but have been left in doubt as to whether the chauffeur or Dykema had testified untruthfully. The jury might very readily have suspected either that the chauffeur was testifying untruthfully or that Dykema had been deliberately imposed upon. The instructions of the court to disregard Dykema's testimony on the subject could not in such circumstances have cured its improper admission. Dykema, being an alleged expert, certainly ought (as the court subsequently stated) to have made a careful examination to ascertain whether the conditions were proper to afford an honest test, and

his failure to have done so, demonstrated by preliminary cross examination, ought to have warned the court that his testimony was liable to be either wilfully false or wantonly reckless, and under such circumstances the court ought not have permitted him to proceed with giving his testimony and to have placed the burden upon the defendant of procuring the necessary evidence to establish its falsity. That the defendant was able successfully to do so, however, did not cure the situation; for, as above pointed out, the jury might readily have reached a mental conclusion, notwithstanding the court's instructions, that the chauffeur rather than Dykema testified falsely. The court, being as it was on notice of the existence of the question whether or not the reserve tank had been drained, ought to have placed the burden on the Government of ascertaining and proving the fact before admitting further testimony about the matter, and had this been done the result would of course have been that neither Dykema nor the chauffeur would have testified further in relation to the matter, and there could have been no question of veracity between them.

PART IV (g).

The admission, before the establishment of the *corpus delicti*, of evidence supposed to tend to establish intent was improper; and the evidence in question was not competent for the purpose for which it was admitted.

Assignments of Error XXVI, XXXVII (*Rec., pp. 1598, 1599*), XLVI (*Rec., p. 1601*), LXXXI (*Rec., pp. 1640-1645*) cover the evidence involved. It consists in Government Exhibits 66 (*Bill of Exceptions, Rec., pp. 1272, 1289*), 77 (*B. of E., Rec., pp. 1295, 1300*), 78 (*B. of E., Rec., pp. 1301-1307*), 100 to 102, inclusive (*B. of E., Rec., pp. 1383-1405*), being books containing records of distillation tests, and Exhibits 80 to 84, inclusive (*B. of*

E., Rec., pp. 1308-1362), being statements showing the quantity of casinghead material received at the refinery at Port Arthur. Assignment LXXXI (*Rec., p. 1640*) covers the denial of the motion to strike out this evidence (*B. of E., Rec., pp. 625-630, 897*).

It appeared that there had been a practice to enter in the distillation test record, upon the tests of consignments of casinghead material, the data shown by the test, together with a description sometimes reading "Kiefer gasoline," sometimes reading "Kiefer gas," and sometimes reading "Kiefer" (Kiefer being the name of the point of origin) up until June, 1917, after which time the description read "unrefined naphtha"; and in these records wherever the word "gasoline" or "gas," following the word "Kiefer," occurred previous to June, 1917, they had been erased (*Rec., pp. 500-520*). Exhibits 80 to 84, inclusive, were monthly statements, the originals of which were sent to the general office at Pittsburgh, and the duplicates kept at the refinery at Port Arthur, which showed the receipts of casinghead material at the refinery, and until the month of June, 1917, the headings on these statements had read "Receipts of Kiefer gasoline," and from June, 1917, they read "Unrefined naphtha from Gypsy Oil Company." On the duplicate copy of these statements kept at the refinery the headings had been cut off up to the month of June, 1917. These records and statements were admitted on the theory that the earlier use of the term "gasoline" constituted an admission, and that the erasures and deletion thereof indicated conscious guilt, and that they were therefore admissible to establish intent. At the time they were admitted the Government had offered no direct evidence whatever to establish that the material shipped was in fact gasoline, but it simply offered the evidence hereinbefore considered, to the effect that under certain different circumstances the Gypsy Oil Company, the defendant, and other parties not con-

nected with the defendant, called or shipped the material as "gasoline."

There was no evidence tending to show when, where or by whom the erasures and deletions were made, other than the defendant admitted that they existed at the time the books and statements were turned over to the Government upon the grand jury inquiry (*Rec., pp. 500-508*).

It was shown, however, that at or about the time the practice arose (December 2, 1916), of describing the material for shipment as "unrefined naphtha," instructions were issued at the refinery to employees to use that name thereafter in describing the material (*Rec., pp. 495, 501*).

It was further shown that the entries in the distillation test books, which were merely lead-pencil blotters, were made by laboratory test boys, whose sole duty it was to put down the results of the tests which they made, and whose duty did not involve characterizing or describing or classifying the material in any way, and who were shown to be unequipped to be capable of doing so (*Rec., pp. 290-303, 468-474, 489-497*).

It was also shown that the originals of the statements Exhibits 80 to 84 had not had the heading "Kiefer gasoline" deleted, but that they remained as originally written (*Rec., pp. 1354, 1359*).

It was not shown that the erasures were made by or at the instance, or with the knowledge or consent, of any one within the scope of whose employment matters affecting freight rates and classifications were embraced; and there was no evidence from which even an inference might be drawn that any one having anything to do with freight rates and classifications ever saw or even knew of the existence of the records in question.

It is therefore apparent (*a*) that the evidence was not even competent to prove intent, and (*b*) that its admission on that theory, before the establishment of the *corpus delicti*, was bound to be highly prejudicial.

(*a*) Evidence to be admissible solely on the ground of establishing intent, ought to be of such a character that it could be explained upon no other reasonable hypothesis.

The most natural, reasonable and plausible explanation as to how these erasures and deletions occurred is apparent from the evidence. The boys handling these records had been given certain instructions, which they failed to carry out at once. Upon finding the matter becoming the subject of inquiry, it was the most natural thing conceivable that they would endeavor to conceal their failure to carry out instructions by making these erasures. It should all the while be borne in mind that before these entries could rise to the dignity of being considered admissions that the material was in fact gasoline, it would have to appear that the entries were made at least by some one within the scope of whose employment there was embraced the designation or classification of the material; and the evidence clearly showed that these boys had no functions of this character. And it should likewise be not forgotten that the very fact that the name "gasoline" when so used was always qualified with the prefix "Kiefer" is evidence of recognition of a distinction between that material and the material ordinarily known as "gasoline." On the other hand, in the light of the fact that the permanent records at Pittsburgh were not changed, nor any other record, the fact that it was freely admitted by defendant that it had been its practice to call the material "Kiefer gasoline" and "casinghead gasoline," and that on shipping orders previous to December 2, 1916, to Port Arthur, and at all times to Pittsburgh, it called the material "gasoline," all of which it freely admitted; it is not even a reasonable assumption that the erasures and deletion in question could operate as an attempt at concealment, the only theory upon which they could be supposed to be evidence of intent.

Intent to be imputed to the defendant from the act of some employee must be the act of an employee having at least a reasonable degree of relationship to the subject-matter involved. The intent would consist in an intent to procure an unlawful concession in relation to the transportation of property. An act done by some employee of the Company before or about the time of the transportation, which would have a tendency to bring about such a result, might reasonably be considered to be evidence of the existence of an intent to do it. But evidence of an act done subsequently, to be admissible at all, must be of a character betokening conscious guilt, such as flight, concealment or destruction of weapons, etc.; and it is perfectly obvious that in such case it could only be the flight, concealment or destruction by the person responsible. Here, the records involved are no part of records having anything to do with freight charges or classification matters, and it would have been just as reasonable to have received as evidence of intent the act of any ex-employee having no more to do with the matter than these laboratory boys, in leaving the country, for example, on the theory that it would constitute flight, and thus be indicative of guilt.

In *Elgin, J. & E. Ry. Co.* v. *United States, 253 Fed. Rep. 907,* the Circuit Court of Appeals for the Seventh Circuit had before it for review the conviction of a railway company under the Elkins Act, and, in considering a portion of the charge of the District Court, which was in substance to the effect that knowledge of various employees of the corporation of various facts, which, if collected into the mind of one agent, would amount to sufficient knowledge of the requisite facts, would be sufficient to impute knowledge to the corporation, said:

> "It would seem that, as stating a rule of general application, the charge is too broad, and that under some circumstances it would be error to give it. For instance, if in the case before us there were

evidence that a car repairer or track hand or other like employee of the company actually saw the contents of the cars in question before they were billed out, and knew they contained strawboard and not paper boxes, the jury under such a charge would be required to find that this knowledge of such an employee was knowledge of the Company. But in the nature of things the knowledge of such an employe, who has no function whatever with respect to receiving or classifying freight, and no concern whatever with shipments or rates or tariffs, and no occasion, purpose or duty to communicate to his employer such incidental knowledge thus coming to him, would not ordinarily be the knowledge of the Company. A corporation is not chargeable with knowledge of facts which become known to its agent, unless the agent in the line of his duty ought and would reasonably be expected to communicate the knowledge to his principal. *Neal* v. *M. E. Smith Co., 116 Fed. 20, 54 C. C. A. 226; Korn* v. *Chesapeake & Ohio Ry. Co., 125 Fed. 897, 62 C. C. A. 417; Reed* v. *Munn, 148 Fed. 737, 80 C. C. A. 215; Mechem on Agency (1st ed.), Secs. 718-721; Tiffany on Agency, p. 262.*" (*p. 912.*)

In *N. Y. Central Railroad Co.* v. *United States, 212 U. S. 481,* the Court had under consideration the validity of that section of the Elkins Act which imputes the act of an agent within the scope of his employment to the carrier. It is clear from a reading of the opinion of the court in that case that it sustained that portion of the act in question solely because of the limitation therein contained of *acting within the scope of the employment.*

(*b*) While it is true that not so much attention is paid in the case of misdemeanors as in felonies, to the rule that evidence of intent is not admissible before the establishment of the *corpus delicti,* nevertheless, when, as here, the admission of such evidence produces a situation where it is impossible to judge how far the jury might have been moved to reach a conclusion by this very evi-

dence, of the existence of the *corpus delicti*, it is of course improper to permit its introduction before the independent establishment of the *corpus delicti*.

> "f. *Corpus Delicti.* The prosecution has the burden of proving that a crime has been committed before the jury proceed to inquire as to who committed it, and a conviction cannot be sustained unless the *corpus delicti* is clearly established."
>
> *12 Cyc. 382.*

> "II. *Corpus Delicti.* As a matter of good practice it is preferable to prove the *corpus delicti* before any evidence is offered to implicate the accused; but the matter is largely in the discretion of the court; and while the state may and should prove the *corpus delicti* first, it is not error to receive evidence against the accused before the *corpus deliciti has been proved.*"
>
> *Ibid., 556.*

> "The confession or mere statement of the accused is not sufficient to establish the *corpus delicti.* The proposition called the *corpus delicti* must be proven by evidence either circumstantial or positive outside of the confession, declarations, or admissions of the defendant, before such confession, etc., can be taken as sufficient to warrant a jury in convicting."
>
> *5 Encyclopedia of U. S. Supreme Court Reports (Michie), 126.*

In *United States* v. *Searcey, 26 Fed. Rep. 435,* the court said:

> "In all trials for crime the prosecution must prove to the satisfaction of the jury that a crime has been committed before the jury proceeds to inquire as to who is the criminal."

In *Alberty* v. *United States, 162 U. S. 499,* and in *Starr* v. *United States, 164 U. S. 627,* the Court reversed

convictions on account of a charge (in identical language in both cases) because of improper weight given to a circumstance of flight, a part of the particular charge in question being:

> "Flight is always relevant evidence when offered by the prosecution, and that it is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense feeble or strong, as the case may be, a confession, and it comes in with other incidents, the *corpus delicti* being proved, from which guilt may be cumulatively inferred."

While, as above pointed out, these cases were reversed upon the ground of improper weight given this evidence by the charge, the order of proof not being in question, since, as shown by the language of the charge, it appeared that the *corpus delicti* was independently proved, yet it is significant that the fact was deemed important.

Wigmore states the rule:

> "*Order and Sufficiency of Evidence of Corpus Delicti.*—(*a*) That the evidence of the *corpus delicti* should be put in *before* the confession is certainly good practice and is occasionally said to be the rule; but the better view is that the trial judge may determine the order of this evidence, on the general principles otherwise prevailing." (Italics his.)
>
> *3 Wigmore on Evidence* (*2nd ed.*), *Sec. 2073.*

See, also:

> *Ibid, Secs. 2072, 2081, 1867, 1869.*

In *Goff* v. *United States, 257 Fed. Rep. 294,* the court had before it the review of a conviction upon an indictment charging introduction of liquor into Oklahoma; and the only proof offered by the government was the fact that the defendant had liquor concealed in his automobile,

and no other proof of the fact of its introduction into the state than statements or admissions made by the defendant, which it was insisted were not alone sufficient to establish the fact of such introduction. The defendant demurred to the evidence on the ground that it was insufficient to prove the crime charged, for the reason that the *corpus delicti* was not established. In reversing this conviction, the court reiterated the rule laid down by it in *Naftzger* v. *United States,* 200 Fed. Rep. 494, as follows:

> "A conviction upon extra-judicial confession, or acts or declarations of a prisoner, will not be sustained, without corroborative proof that the property was in fact stolen." (*257 Fed. 296.*)

This court further said:

> "We do not hold that declarations of a party may not be considered in finding the *corpus delicti;* but, standing alone, they are insufficient, and other facts and circumstances cannot be said to be corroborative, when they point as directly to some other offense as they do to the crime charged." (*p. 296.*)

In this case, had the trial court observed this rule the defendant undoubtedly would have rested on the Government's case, and in such event it is inconceivable that the jury would have convicted at all without this evidence; and even had it done so, such a verdict would unquestionably have been set aside.

As the record now stands, this court is unable to determine how much the jury may have been influenced by this evidence in reaching its conclusion that the material could be called "gasoline." But it is quite apparent that in all probability this evidence was extremely potent in bringing about that conclusion. The very fact that the court admitted it at the time it did could not but tend to influence the jury to regard all subsequent evidence with

suspicion, because of the natural inference that the court, in admitting this evidence on the theory of intent, must have believed a substantive offense existed.

PART IV (h).

The evidence concerning the rates in force does not sustain the charge.

Assignments of Error LIV (*Rec., p. 1602*), Government Exhibit 139 (*Bill of Exceptions, Rec., p. 1461*); LXXIV (*Rec., pp. 1631, 1632*), Government Exhibits 36 to 42 and 45 to 56 (*B. of E., Rec., pp. 978-1212*) and LXXXIII (*Rec., pp. 1646, 1647*). Charge (*B. of E., Rec., pp. 912-930*).

The charge of the court (*B. of E., Rec., pp. 912-930*), that the rates alleged by the indictment to have been legally established and in force during the period covered by the indictment, for the transportation of gasoline between the points charged, were so established and in force, was based on Government Exhibits 36 to 42, inclusive, and 45 to 56, inclusive (*B. of E., Rec., pp. 978-1212*), being excerpts from tariffs produced from the files of the Interstate Commerce Commission, which it was maintained by the Government show such facts.

These assignments of error would be pressed with reluctance because of their technical nature, were it not for the fact that the whole prosecution itself depends on the most extreme technicality, when it is remembered that the rates on unrefined naphtha were openly established by the carriers at defendant's request for the express purpose of transporting the traffic involved; that the de fendant caused notice to be given to the initial carrier that upon the becoming effective of said rates the commodity theretofore shipped under the description "gasoline" would thereafter be shipped under the new description; that the traffic was openly carried on this de-

scription with full knowledge on the part of the safety inspectors whose duty it was to change the same if erroneous, for a period of two years, when the Government stepped in and said, "You have made a mistake in the choice of name for the publication of rates; we shall take advantage of such mistake and criminally prosecute you." It is of course not conceded that any mistake was made, but confidently asserted that the description adopted was correct and appropriate. Nevertheless, in such a situation, the Government ought in simple justice to be held to the strictest of proof upon the very technicality on which it depends. It maintains, as it necessarily must, that the material shipped is gasoline *as described in the tariffs* which it asserts were effective. Turning then to these tariffs, it is to be observed that every one of the tariffs purporting to name rates on gasoline during the period of time involved refer to and are governed by the western classification currently in force. As an illustration, Government Exhibit 36, Southwestern Lines Tariff No. 26-T, shows on its face that it is governed, except as otherwise provided therein, by the western classification (*Rec., pp. 978-982*).

Turning to Government Exhibit No. 37, western classification (*Rec., p. 1062*), we find (*Rec., p. 1081*) gasoline to be listed *as a petroleum product,* and the basis for computing the weight thereof is of gasoline *as a petroleum product* (*Rec., p. 1092*). The weights charged in the indictment are, as shown thereby, established on the basis provided by the western classification, and the tariffs are complete only by taking into consideration these provisions of the classification. Consequently, the rates named on gasoline shown by the evidence are on gasoline, a *product of petroleum,* and do not purport to be otherwise.

The evidence in the case is clear, it being admitted even by the Government's own experts, that it is not known whether casinghead gas comes from petroleum at

all or not. Certainly it is not a product of petroleum in the sense of having been produced from it by any human agency. And it may well be the fact that it does not come from petroleum at all, but exists in the same earth chambers with petroleum, independently, however, and originating from other sources (*Rec., pp. 676, 890*).

In such circumstances, it is obvious that no jury could find beyond a reasonable doubt the essential elements of the alleged offense. Unless the commodity shipped is a product of petroleum, the rates named on gasoline, charged in the indictment, do not cover the commodity shipped at all. This situation applies to every count of the indictment.

The 36th to 40th, inclusive, and 65th to 100th, inclusive, counts of the indictment relate to transportations during the period of federal control, which began December 28, 1917, and continued up to beyond the time dealt with in the indictment. It was and is maintained by the defendant that there were no rates legally in force during this period of time, due to the failure of the Director General of Railroads of the United States to adopt, in the manner and form provided by law, the tariffs of the carrier companies whose properties were taken over by him.

Section 6 of the Interstate Commerce Act, as amended, and necessarily claimed by the Government to be in force at the time involved (*24 Stat. L. 379, 25 Stat. L. 855, 34 Stat. L. 584*), provides that carriers subject to the act shall file with the Interstate Commerce Commission, and print and keep open to public inspection, schedules showing the rates for transportation; prohibits transportation unless said rates shall have been so filed; prohibits changes therein except after thirty days' notice to the Commission and the public, published as required, with the proviso that the Commission may in its discretion, for cause, allow changes upon less than the notice specified,

> "or modify the requirements of this section in respect to publishing, posting and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions,"

and with the further proviso that the Commission may make suitable rules and regulations governing the form of the schedules; and that

> "the names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission."

And the Elkins Act (*32 Stat. L. 847, 34 Stat. L. 584*), under which this prosecution is brought, makes the offense consist in transportation

> "at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to Regulate Commerce and the acts amendatory thereof."

Pursuant to the authority contained in the Act to Regulate Commerce, to prescribe the manner and form of publication and adoption, the Interstate Commerce Commission, with the express purpose of meeting situations substantially identical with those here involved, did establish rules and regulations to cover the adoption by one carrier of rates published by another carrier and in force upon an occasion of sudden transfer of operations from the previous carrier to the second carrier. These rules and regulations are Exhibit No. 57 (*Rec., p. 1212*), being Circular No. 18-A of the Interstate Commerce Commission, which was in force at the time the Director General took over the operations of the corporate carriers (*Rec.,*

pp. 391, 392); and as will be seen by reference to Rules I and J set forth in full on *pages 1213 and 1216 of the Record*, it provides that in case of change of ownership or control of a carrier, the one whose line is taken over shall unite with the other in the publication of a supplement to the existing tariffs on file with the Commission, the former withdrawing and the other establishing such tariffs; that such supplements shall be numbered consecutively as supplements to the tariffs involved; and that if the new carrier intends to use tariffs issued by agents of the old carrier, the new carrier shall

> "issue, file and post, with I. C. C. number, and adoption notice substantially as follows:
>
> "The (name of carrier) hereby adopts, ratifies, and makes its own, in every respect as if the same had been originally filed and posted by it, all tariffs, rules, notices, concurrences, traffic agreements, divisions, authorities, powers of attorney, or other instruments whatsoever, filed with the Interstate Commerce Commission by the (name of old carrier) prior to (date) the beginning of its possession. By this tariff it also adopts and ratifies all supplements or amendments to any of the above tariffs, etc., which it has heretofore filed with said Commission."

And it is provided that such adoption notice may be made effective and filed on immediate notice (instead of the thirty days required by the act).

As further pointed out by the Commission in this circular, a carrier surrendering control of its property has no further right to publish rates, except under proper authority from the carrier to whose control the property passes, and the public has a right to available and lawfully applicable rates over that property.

If it be contended that the Director General was not obligated to comply with these requirements of the law and regulations made pursuant thereto, such contention

admits the argument for defendant in Part II (c) hereof to the effect that the Director General, being not subject to the requirements of the Act to Regulate Commerce, no offense could exist under the Elkins Act in respect to transportation by the Director General, because of the absence of any requirement to establish rates in the manner "required by said Act to Regulate Commerce and the acts amendatory thereof" (Elkins Act, *supra*).

If, on the other hand, it is admitted that the requirements of the Interstate Commerce Act concerning publication and filing of tariffs were in force, then it is perfectly clear from the record that the Director General did not comply with such requirements, and consequently there was no rate legally in force after he assumed control of the properties (*Rec., pp. 374-9, 392-4*).

The Government attempted to meet this situation by offering in evidence Government Exhibit 139 (*Rec., pp. 1461, 1462*), which it pretends constitutes such adoption. This exhibit is a circular issued by the Director General of Railroads, being Order No. 1, which recites that the Director General, pursuant to proclamation of the President, has taken possession and control of certain transportation systems, the officers, agents and employees of which are directed to take immediate and careful notice of the proclamation, and, in addition to the provisions thereof, orders that they shall continue in their existing relation, directing the manner of operation, that designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may be promoted, that traffic agreements between carriers must not be permitted to interfere with expeditious movements, that new through routes are to be established, and

> "Existing schedules of rates and outstanding orders of the Interstate Commerce Commission are to be observed, but any such schedules of rates or orders as may hereafter be found to conflict with the purposes of said proclamation or with this

order shall be brought immediately by wire to the attention of the Director."

The Government produced as an expert witness an employee of the Tariff Division of the Interstate Commerce Commission, who brought with him from the tariff files of the Commission the schedules assumed to cover the transactions involved in the indictment. He brought all the tariffs and supplements thereof which he found in the tariff files of the Commission affecting the matter, and there was not included among them any supplements of adoption by the Director General of the existing tariffs (*Rec., pp. 392-4*). Upon objection on behalf of defendant, on the ground of lack of proof of adoption of the tariffs by the Director General, and the intimation of the court that he would hold the proof respecting tariffs during the period of federal control fatally defective for lack of such adoption, then, and then only, did counsel for the Government wire the Interstate Commerce Commission to forward a copy of this order of the Director General, and offered it, together with the certificate of the Secretary of the Commission appended to the exhibit, as establishing such adoption (*Rec., pp. 374-9, 392-4*). The certificate of the Commission, as will be observed, is carefully worded to go as far as the facts would permit towards creating the impression that the order has been lodged with it as a tariff publication. But the very form of this certificate, by its failure to go that far, convincingly shows, as does the failure of the expert to find or bring it from the tariff files of the Commission, that this order was not filed as any supposed compliance with the requirements concerning adoption of tariffs, but, on the contrary, that a copy was simply sent to the Commission as a matter of information to it and in no sense as a tariff publication.

By reference to Exhibits 36 to 42, inclusive, and 45 to 56, inclusive (*Rec., pp. 978-1212*), it will be observed that

the tariffs actually coming from the tariff files of the Interstate Commerce Commission all bear on their face a stamped notation, similar to that shown on page 979 of the record, reading:

> "Public File. Amended by I. C. C. No. 1186; Effective 5-2-1917. Cancelled by I. C. C. No. 1226; Effective 5-10-18. Received; Interstate Commerce Commission; 4-1-005; June 12, 1914; Division of Tariffs."

Yet there is no such stamp, nor any other pretense, upon the Director General's order (*Exhibit 139*), indicating that it ever was in the tariff files or considered to be any part thereof. Quite apart from this, it is obvious that this order fails to comply with the form provided by the Interstate Commerce Commission hereinabove set forth for adoption of tariffs. It has no pretense to being a numbered supplement to tariffs, and there is no withdrawal on the part of the carrier corporations. There is no proof whatever of its being published as a tariff supplement, kept open to public inspection, or otherwise treated as a tariff publication. There is no adoption of publication agencies, and several of the exhibits, like Government Exhibit 41 (*Rec., pp. 1110, 1111*), being supposed tariff publications after the beginning of federal control, purport to be issued by agents, not on behalf of the Director General but on behalf of the former carrier corporations (*Rec., p. 1111*).

It should be borne in mind that this is a criminal case, and that certainty is required therein. It is not the defendant that is relying on technicalities, but it is the prosecution which is wholly relying on technicalities, and it should therefore be held to the highest degree of certainty in the attempted establishment of its contention. Such certainty requires, in order to constitute an offense, a showing that there was a departure from rates established and filed in the manner and form *as required by*

the Interstate Commerce Act, and it is submitted that the Government has failed to make the requisite proof on this score.

PART IV (i).

The rejection of evidence offered by defendant showing use of names other than "gasoline", by other parties; the representations actuating the carriers in establishing the unrefined naphtha rates; the fact that the laws of Texas prohibit and make criminal the calling of the material shipped gasoline or gasoline in conjunction with any other word; that the laws of Oklahoma concerning gasoline do not embrace this material; the fact that inspection and taxation by the corporation commission of Oklahoma does not embrace this material as gasoline, —was erroneous.

Assignments of Error LXII (*Rec., p. 1618*), rejection of the evidence offered on cross examination of Government witness League showing that there had been a controversy between himself and another inspector of the Bureau of Explosives as to the proper designation of the material shipped by the Gypsy Oil Company, which controversy had been by them submitted to the head of the Bureau of Explosives, who had in turn instructed these inspectors that the description used by the Gypsy Oil Company was proper under the tariffs (*B. of E., Rec., pp. 437, 438*): LXIII (*Rec., pp. 1620-1622*), rejection of evidence offered on cross examination by the witness League, who had testified on his direct examination that casinghead producers with whom he came in contact were accustomed to describing their product as gasoline, to the effect that at a meeting of a large number of the casinghead producers of the locality which he attended, there was discussion among them in his hearing of the proper name by which the material should be described and the divergence in nomenclature concerning it as be-

tween the tariffs and the safe transportation rules (*B. of E., Rec., pp. 439-441*): LXIV (*Rec., p. 1622*), rejection of evidence offered upon cross examination of Government witness Powers, to the effect that he had established the rates on unrefined naphtha based on the representations of defendant's traffic manager that it was a low grade article to be shipped, treated and reshipped to Port Arthur to be further finished (*B. of E., Rec., pp. 559-566*): LXV (*Rec., pp. 1622, 1623*), rejection of the evidence offered on cross examination of Government witness Reilly, to the effect that in establishing the rates on unrefined naphtha he was governed by the fact, represented, that it was an unfinished product and that the degree of finishing or refinement or the method of production did not enter into the question of what might be shipped under the description (*B. of E., Rec., pp. 567-573*): LXVI (*Rec., pp. 1623, 1624*), rejection of the statute of Texas (Act of March 24, 1919) offered in evidence, which makes it a criminal offense in that state to describe the material here involved either for purposes of sale or transportation as gasoline or gasoline coupled with any other word (*B. of E., Rec., pp. 722-727, 794-796*): LXXI (*Rec., pp. 1629, 1630*), rejection of section 4353 of the Revised Laws of Oklahoma, offered by the defendant as evidence (*B. of E., Rec., pp. 791-793*) showing that state prohibits sale of this material for domestic uses: LXXIII (*Rec., p. 1631*), rejection of testimony offered (*B. of E., Rec., pp. 884, 885*) on cross examination of Government witness DeBar, to the effect that the State of Oklahoma, through its Corporation Commission, does not treat the material involved as gasoline with respect to taxation and inspection of gasoline.

It is difficult to conceive upon what theory the rejection of this evidence could be justified, in view of the evidence of the Government, admitted in its direct case. We do not contend that the fact that the head of the Bureau of Explosives instructed his inspectors that the descrip-

tion "unrefined naphtha" used by the Gypsy Oil Company was authorized by the tariffs, established that as a legal conclusion. It was not offered or suggested that it was admissible upon any such theory. It would seem, however, to be apparent that it was admissible upon at least two theories: *One,* as cross examination of the witness who had theretofore testified that those with whom he came in contact were accustomed to calling the material "gasoline," whereas here was an instance directly contradictory, of his chief instructing him to the contrary. Apart from this, any number of witnesses had been permitted to testify for the Government that there was a custom of calling the material "gasoline." If such evidence was admissible, clearly the defendant ought to be allowed to show instances of other people pursuing a different course. Here was a man whose functions naturally brought him in contact very much with the subject, and his views of the custom would be of much more value than the ordinary individual's. *Again,* it was a part of his duty to see that the proper descriptions were used, and he was under a legal obligation to prevent the use of the name "unrefined naphtha" on material to which it did not properly apply (*Rec., pp., 435, 436*).

As to the evidence of the meeting of casinghead producers, this was likewise admissible on at least two grounds, *i. e.,* cross examination of the witness and as negativing any supposed unanimity of custom. The witness had testified that certain casinghead producers with whom he came in contact were accustomed to calling the material "gasoline." Yet here was a meeting of a majority of the casinghead producers of the locality where the question of proper nomenclature was directly in controversy, thus contradicting the inference sought to be raised from his direct testimony to the effect that there was a custom of calling the material "gasoline," and the evidence likewise tended to negative the existence of any such supposed custom.

While, as maintained under subdivision (3-a) of this Part, it is urged that authority to construe the scope of a tariff classification is exclusively confided to the Interstate Commerce Commission, still, with the trial court denying that view, it became and was most important to ascertain the meaning of the term "unrefined naphtha." This would be so even if the court were of the view that "gasoline" was undoubtedly an appropriate name for the material; for, if "unrefined naphtha" was also an appropriate name, there would of course have been no offense involved in utilizing the description carrying the lower rate. Indeed, there is doubt as to whether it would have been proper to have used the description "gasoline" if the description "unrefined naphtha" would also embrace the material, because the rates under the latter description were put in as commodity rates expressly to cover the traffic. It was contended by the Government that "unrefined naphtha" was not an ordinary term or one in general use, and it was not contended by defendant that it is. Indeed, it is highly improbable that defendant would ever have conceived asking for the establishment of rates upon this description, but for the fact of their establishment in contiguous territory for the traffic of the Carter Oil Company, thus bringing the description, and more especially the basis of a 2-cent differential over the crude oil rate, established by the Commission in the *National Refining Company case*, to the attention of defendant, thus indicating the opportunity to obtain rates on an intermediate basis which it had long sought, to cover the transportation of an unfinished product, asking for them however under the name "gasoline," and which it is shown by the carrier's letters was declined because of the fact that it would disturb the refined oil rate basis.

Is is therefore apparent that the term was not an ordinary word as to which the court might have recourse to a dictionary for its interpretation. Indeed, if it was,

it would then have been the duty of the court to have construed it and instructed the jury, and not to have permitted the evidence, as it did, from a number of witnesses upon the question of its meaning. In such case the two best possible sources of evidence as to the proper meaning of the term would be (*a*) those engaged in the business (and who were heard) and (*b*) those who established the description and rates.

Messrs. Powers and Reilly were the gentlemen that did the latter. Defendant sought to show that in the use of the words as published by them in their tariffs they had not intended to limit, and therefore had not limited, them to any such construction as that sought to be given it by the Government, of excluding material supposed to have undergone a process of refining by nature under the earth, or one free of impurities, but that they meant merely to provide for the transportation of an unfinished naphtha material. This testimony was of the greatest importance, when it is remembered that the controversy finally resolved itself into merely a question of whether "unrefined" and "unfinished" were synonymous. The Government was ultimately compelled to concede that the material is quite properly denominated "naphtha" and that it was in fact unfinished, from the point of view of being commercial gasoline, in that it needed to go to a refinery for correction of its boiling points before it would be marketable gasoline; and it then shifted to the position that "unfinished" was not "unrefined," and that blending to correct boiling points was not a process of refining.

On the other hand, the evidence of all persons qualified to give testimony concerning the use of the terms "refined" and "unrefined" as a special use applied to the petroleum industry, testified in substance that blending was a part of the art of refining, and that a product unfinished was unrefined until finished, and that a refined product was a finished product. What more conclusive

evidence could there be of the proper definition of the term "unrefined naphtha" used in the tariffs than that the very officers who established it placed the same construction on the term that those versed in the art of refining did.

The statute of Texas (Act of March 24, 1919) which was offered in evidence and rejected, is as follows:

> "*Section 1.* It shall hereafter be unlawful for any person, firm, association of persons or corporation, to sell gasoline, benzine, naphtha, or other similar product of petroleum, capable of being used for illuminating, heating or power purposes, under any other than the true name of said products; and such petroleum products shall be subject to inspection by the proper authorities as provided in this act.
>
> "*Sec. 2.* It shall hereafter be unlawful for any person, firm, association of persons, corporation or carrier selling or transporting for hire any gasoline, benzine, naphtha or other highly inflammable substance made from petroleum to fail to plainly mark the packages containing the same in accordance with the regulations of the Interstate Commerce Commission unless such regulations should conflict with the provisions of this act.
>
> "*Sec. 3.* It shall be unlawful for any person, firm, association of persons, corporation or carrier selling or transporting for hire any gasoline, benzine, naphtha or other similar product of petroleum, to fail to truly label in large letters showing the name of the manufacturer and the place of manufacture of the products, any tank car, barrel, cask, tank wagon, receptacle or reservoir in which any petroleum product shall be shipped or stored within this state, or from which sales or delivery of the same are to be made.
>
> "*Sec. 4.* It shall hereafter be unlawful for any person, firm, association of persons or cor-

poration, to sell any product of petroleum to be used for illuminating purposes unless such petroleum product is such that it will not flash at a temperature less than 110 degrees Fahrenheit.

"*Sec. 5.* It shall hereafter be unlawful for any person, firm, association of persons or corporation, to sell as gasoline any substance, liquid or product of petroleum which falls below the standard and definition of gasoline as provided in this act.

"*Sec. 6.* For the purpose of this act the word GASOLINE whether used alone or in connection with other words shall apply only to the petroleum products complying with the following minimum requirements:

"*(a)* Boiling point must not be higher than 60° C (140° F).

"*(b)* Twenty per cent of the sample must distill below 105° C (221° F).

"*(c)* Forty-five per cent must distill below 135° C (275° F).

"*(d)* Ninety per cent must distill below180° C (356° F).

"*(e)* The end or dry point of distillation must not be higher than 220° C (428° F).

"*(f)* Not less than ninety-five per cent of the liquid will be recovered from the distillation.

"*(g)* Gasoline to be high grade, refined and free from water and all impurities, and shall have a vapor tension not greater than 10 pounds per square inch at 100 degrees Fahrenheit temperature.

"*Sec. 7.* The apparatus and methods of conducting all tests and arriving at proper standards of gasoline and other products under this act shall be those now or hereafter authorized and used by the U. S. Bureau of Mines."

General Laws of Texas, 1919, Chap. 125 (passed by Senate Feb. 28, 1919, House March 17, approved March 24, effective 90 days after adjournment).

It is not necessary to consider whether as a police regulation this statute might validly apply even to interstate commerce, particularly so since during the time the Interstate Commerce Commission rule authorizing the calling of the material "casinghead naphtha" was in effect it was possible to comply with those rules without violating this statute.

The specifications given in this statute of the only material which may lawfully be called "gasoline" are the same as the War Department's standard, the Bureau of Mines' standard and defendant's own standard (*Rec., p. 596*). The Government does not dispute the fact that the material shipped does not begin to meet these specifications, but, on the contrary, is wholly outside of them. Instead, the Government insists that whether or not a gasoline meets some particular standard does not determine whether or not it is gasoline. We do not dispute this proposition, nor do we for a moment contend that all material which does not meet these particular specifications is not gasoline. We concede that any material which will meet the definition given by defendant's experts, *i. e.*, one suitable for ordinary use under ordinary circumstances in an ordinary motor car, is gasoline. This statute was not offered with any idea of attempting to prove that only such material as meets the specifications therein given is gasoline. It was offered upon the theory of negativing the implication sought to be raised by the Government's testimony that the material shipped was customarily called gasoline.

Section 4353 of the Revised Laws of Oklahoma, 1910, is as follows:

> "Gasoline, benzine, naphtha or other highly inflammable liquids, the products of petroleum, shall not be tested by the flash test, but the said fluids shall be tested as to their safety by the specific gravity test. Whenever the said liquids shall be

shown to have a specific gravity greater than seventy-four degrees (at a temperature of sixty degrees Fahrenheit) as indicated by the Baume hydrometer for liquids lighter than water, then it shall be deemed unsafe, and its sale or other disposition is hereby prohibited for use in vapor stoves or other domestic uses, and any person selling or otherwise disposing of the same shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars for each barrel, cask or other receptacle or part thereof of such oils so sold as above prohibited."

Revised Laws of Oklahoma, 1910, Vol. 1, Sec. 4353.

It will be noted that this section of the Oklahoma laws declares to be unsafe, and prohibits the sale for use in vapor stoves or other domestic uses, any liquid having a specific gravity greater than 74 degrees Baume at 60 degrees Fahrenheit. The evidence in this case shows that the material shipped runs from 74 to 84 degrees Baume. Clearly, therefore, it comes within the class declared by this law to be unsafe and prohibited to be sold for use in vapor stoves or other domestic use.

In addition to the above two statutes, the defendant offered to show that the State of Oklahoma, which has a gasoline inspection and tax law, does not tax or inspect this material as gasoline.

If the proper name of the material in question is to be determined, not as a scientific fact known to the court and shown by the scientific literature on the subject, but is rather to be determined and shown by the custom of the people in the use of names to designate it, it is difficult to conceive of a higher class of evidence of this character than the laws of the people. When custom and usage are in question, there is nothing so persuasive as the laws of the community involved. Suppose there was evidence to the effect that there had been a custom

in the State of Texas of calling this material "gasoline." What stronger evidence could there be that such custom had been stamped out than in showing that the laws of that state had made it criminal to indulge the practice. It should be borne in mind that the proof of custom offered is not direct evidence of what the material is, but simply evidence from which an inference might be drawn, Here, however, we have a statute that prohibits such a custom. It is inconceivable that a state would pass a law making it a criminal offense to describe a commodity by its true name. On the other hand, the inference is irresistible that a statute of this character was passed for the express purpose of preventing the use of an improper name of the commodity. The suggestion of the trial court that the statute may have been passed at the instance of defendant, as a reason for its exclusion, is of course absolutely without merit (*Rec., p. 724*). Even if such had been the case, the statute would none the less have been admissible, for it cannot be assumed or presumed that the legislature was corrupted or that it acted otherwise than properly. There is little doubt, however, of the effect upon a jury of a remark of this character by the trial court in its presence.

The law of Oklahoma and its practice with respect to taxation and inspection stand upon the same footing as the Texas statute. There could be no higher quality of proof of the custom and usage of a people than its laws and official acts. The Corporation Commission is under a duty of law to inspect and collect taxes on gasoline. If this material were in fact gasoline, it would be violating its duty not to inspect and tax it as such. It is entitled to a presumption of discharge of its legal duty. And consequently, whatever value may attach to its interpretation and conduct towards establishing that the material is not in fact gasoline, certainly its interpretation and conduct must have great weight towards establishing custom and usage to the contrary.

PART IV (j).

The rejection of other evidence offered by defendant was erroneous.

The evidence here considered is covered by Assignments of Error as follows:

LXI (*Rec., p. 1616*), testimony (*Bill of Exceptions, Rec., pp. 282, 283*) offered on cross examination of Government witness Waddell, the carrier agent at destination, by which defendant sought to show that upon the first attempt of the carriers to assess gasoline rates on its shipments defendant procured a preliminary injunction from the United States District Court for the Southern District of Texas, which was still in force: LXX (*Rec., pp. 1627-1629*), rejection of defendant's exhibits 143 to 148, inclusive (*B. of E., Rec., pp. 1478-1499*), being certified copies of the pleadings in said injunction suit (*B. of E., Rec., pp. 786, 787*): LXVII (*Rec., p. 1624*), rejection of evidence offered by defendant by its expert witness, Dr. Schock, tending to show how it is possible scientifically to determine by its curve that a mixture of casinghead product and lubricating oil is not gasoline (*B. of E., Rec., pp. 733, 734*): LXVIII (*Rec., p. 1625*), rejection of evidence offered by defendant by its expert, Mr. Taber, that the definition of the term "unrefined naphtha" given in the work of Bacon & Hammer (read by him) comprehended casinghead product (*B. of E., Rec., pp. 780-784*): LXXII (*Rec., p. 1630*), rejection of the evidence offered by defendant on cross examination of the Government's expert witness Dykema as to the finished commercial products of a petroleum refinery (*B. of E., Rec., pp. 864, 865*).

Bearing in mind that the court had already admitted evidence offered by the Government, which it was claimed tended to show intent, it was naturally of the utmost

importance that the defendant should be accorded opportunity to negative the existence of any such intent. With this object in view, defendant sought to show that after the material had been transported by the carriers for over two and a half years upon the description "unrefined naphtha," with full knowledge to them through the observance of the safe transportation regulations which required and permitted that certain placards be used only upon casinghead product, upon the first attempt of the carriers to assert that such description and classification was wrong and that the gasoline rates should instead be applied, defendant immediately enjoined said carriers and put up a bond to protect them in the amount of the difference between the charges in the event it should ultimately be found by the court that the gasoline rates should be applied, and attempted to bring this matter to issue on the merits months before any indictment was returned. Surely such a course indicated the best of faith on the part of the defendant.

Even if it be supposed that the defendant was wrong in its belief that the material should be properly classified as unrefined naphtha, that alone would not be sufficient to convict it of a crime of wilfully and knowingly obtaining a concession. Consequently, when the Government had been permitted to produce evidence of intent, the defendant ought certainly to have been permitted to show this circumstance as negativing intent.

There is a rule frequently adverted to in this class of cases with which this court is of course familiar, to the effect that it is not incumbent upon the Government to expressly establish intent, that is, that under the familiar doctrine that persons are presumed to intend the natural consequences of their act, that proof of the act is sufficient to imply intent. Since the enactment of the Elkins Act, the Government has persistently taken the position that this rule means that there is an *irrebuttable* presumption

that whatever is in fact unlawful, was in fact so intended to be. In other words, that what is the legal rate is a legal conclusion; that any departure therefrom is therefore unlawful; that, being as the thing which is unlawful had been done, there was an irrebuttable presumption that it was intended to be done. The doctrine was urged upon this Court in the *Armour case* (209 U. S. 56), and left by it as a *quaere* undecided.

In the *Lehigh Coal & Navigation Company case* (250 U. S. 556), the defendant below sought to offer evidence tending to show its good faith in the transaction there involved, upon the theory that such showing tended to negative wilful intent and that the defendant was entitled to have the jury pass on the question of intent as a fact. The trial court, however, struck this evidence out and refused to allow it to go to the jury, upon the contention that the intent was irrebuttably to be presumed from the acts and that if there was any mistake it would not be a mistake of fact but of law. The propriety of this course of the trial court was certified to this Court by the Circuit Court of Appeals, and the Supreme Court, brushing this nonsense aside, reversed the conviction and sent the case back for retrial. The defendant in that case had offered evidence tending to show that an attempt had been made to publish, in what was conceived to be legal tariff form, certain lateral allowances made to it; that it believed, and had reason to believe, that they had been lawfully published; and that the Interstate Commerce Commission's investigators had examined into the matter and raised no objection. The defendant's evidence along this line was received over the objection of the Government, but the court finally struck it out and refused to submit the question of good faith to the jury, and the certificate of the Circuit Court of Appeals to the Supreme Court asked the following questions:

> "*1.* In the criminal prosecution of a shipper for knowingly accepting transportation at less than

the duly established rate by receiving an allowance that was referred to in the tariff but was not specified in figures therein, has the defendant a right to offer evidence that the allowance was received under the honest belief that it was lawfully established by the tariff, and under the honest belief that in receiving it he was not disregarding what he believed to be the provisions of the tariff but was complying therewith?

"*2.* Upon the foregoing facts, and in view of the kind and amount of evidence offered upon the subject of good faith, did the District Court err in the present case by refusing to submit the question to the jury?" (250 U. S. 562.)

Upon these questions the opinion of the Supreme Court is as follows:

"The questions asked depend upon the construction of the Elkins Act, as enacted in 1903 (32 Stat. 847) the relevant part of which is as follows: '• • • It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall *by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier* • • •.' And under an amendment in 1906 (34 Stat. 584), an offender, 'whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor.'

"The way to a correct construction of the act was to an extent cleared by the case of *Armour Packing Co.* v. *United States*, 209 U. S. 56. Its evolution was there detailed. It was said that carrier and shipper are charged with an equal re-

sponsibility and liability and that the act 'proceeded upon broad lines' to accomplish this equality, and 'that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law.' And this was declared in various ways to be the test of obligation and liability and the 'form by which or the motive for which' its evasion or disregard is accomplished is not of modifying or determining consideration. It was in effect decided that the purpose of the statute took emphasis and meaning from the use of the word 'device,' and 'device' was defined to be 'anything which is a plan or contrivance' and is 'disassociated' from qualification and 'need not be necessarily fraudulent,' and by it the act sought 'to reach all means and methods by which the unlawful preference of rebate, concession or discrimination is offered, granted, given or received.'

"It is in effect the contention of the Government that the language of the case exhausts definition and excludes the supposition of the questions of the Circuit Court of Appeals. We are unable to concur. The language of the case is easily explained by the question that was presented for decision. The Armour Packing Company contended that the act was directed only at fraudulent conduct, the obtaining of a rebate by some dishonest or underhand method, concession or discrimination. The language of the court was addressed to this contention and its selection and adequacy are manifest.

"No such contention is made in the case at bar and there are other distinguishing elements. It will be observed that by the statute and the decision the test of quality is the tariff rate. It was said in the opinion that it is 'the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates' (*New York Central R. R. Co.* v. *United States*, 212 U. S. 500, 505). And such was the offense of the Armour Packing Company.

There was no evasion of the tariff rate in the case at bar. The filed tariff indicated the existence and obligation of the 10th covenant of the lease from the Company to the Railroad, that is, the fact of the allowance was declared, though it did not have specification in figures. The tariff, of course, would have been more definite and complete with such specification, but its sufficiency was certainly believed in, for between 1906 and the date of the indictment it had 262 repetitions. The Company was given besides the assurance that it had the sanction of the Interstate Commerce Commission.

"There was no attempt at deception. The Commission knew by examination of the Company's books of the allowance and the amount of the allowance. Such, then, is the situation, and distinguishes the case from the *Armour Packing Company* cases. There there was an omission to comply with the statute and the omission was attempted to be justified by honesty of motive and purpose; here there was compliance or attempted compliance with the statute—a tariff filed—and if a question could be raised upon its legal sufficiency and belief of the Company in its legality was supported by high authority and those circumstances can bring into action and exculpating effect the provision of the statute which requires the acceptance of a rebate to be 'knowingly' done to incur the guilt of a misdemeanor. This conclusion gives no detrimental example against the efficacy of the law.

"We think this comment and conclusion enough to dispose of the questions asked and that there is no necessity to review the cases cited by the Company or the Government.

"Some of the contentions of the Government we may notice. It is contended that the 'lateral allowance' provided for in the 10th covenant and footnote to the tariff was not for transportation services and besides that there was no testimony whatsoever that the meaning of any provision of the tariff was misunderstood. The mistake, if any, it is hence insisted, was a mistake of law, not of

fact. Two deductions are hence made by the Government: (*1*) That the allowances were not made for transportation services; (*2*) mistake of law is irrelevant to the question of the guilt or innocence of the Company.

"To the first we may reply it is not involved as an element in the question asked of this court and if it have any justification, as to which we express no opinion, it no doubt will be considered by the Circuit Court of Appeals upon the return of the case. The other expresses a refinement. Indeed, the contention of the Government is somewhat elusive and we are not sure that we exactly estimate it. It is said 'The sole misunderstanding which the excluded testimony tended to show would consist in supposing that the 'allowances' could be justified by the footnote in the tariff and that, as we have seen, would be a misunderstanding of the Elkins Act, not of the tariff.' We are unable to concur. There was no misunderstanding of the Elkins Act or what it required. The misunderstanding was induced by practice and the opinion of those in authority that the act was complied with and the word 'knowingly' therefore, as we have already indicated, must be considered and given exculpating effect if error there was.

"We therefore answer the first question in the affirmative, but as explained by reference to the certificate of facts above. We do not think it is necessary to answer the second question." (*250 U. S. 562-566.*)

In the present case the situation is even worse than it was in the *Lehigh Coal & Navigation case.* Here the court allowed the Government to produce evidence of supposed intent, *but refused to allow the defendant to introduce evidence to negative such supposed intent.*

The evidence offered by Dr. Schock concerning the character of a curve that would result from the distillation test of material composed of a mixture of casinghead product and lubricating oil was important. It was

shown by an abundance of testimony that the approved method of determining whether or not a material was suitable for use as gasoline was by plotting the curve of its distillation; that such a curve would demonstrate by the relation of the boiling points whether or not the material was suitable. As an illustration, he was demonstrating that the curve of such a mixture as that suggested would indicate why the material would not be gasoline. With such a demonstration it would have been simple for the jury to understand the reasons why, and believe that, the casinghead product, either unblended or blended as shipped to defendant, would not be suitable for use as gasoline.

The rejection of Mr. Taber's testimony, to the effect that the definition of the term "unrefined naphtha" given in the work of Bacon & Hamor (read by him) comprehended casinghead product, was quite unfair to the defendant. The work of Bacon & Hamor had been written in 1914 and published in 1916, long before any of the transactions involved in this trial had occurred, and the fact that their definition of the term would embrace this material was extremely important. This court can see that it is a fact that the definition would comprehend this material, the definition being that it was those naphtha fractions boiling up to a temperature of 150 degrees Centigrade under atmospheric pressure. As the evidence of all the experts and all of the tests showed the material to be such, the witness ought therefore to have been allowed to explain to the jury that such was the case. The bare statement of the definition to the jury was not sufficient to show it that the material was embraced therein.

The rejection of the evidence sought to be adduced from Government witness Dykema upon his cross examination as to the finished commercial products of a petroleum refinery was excluded by the court upon the theory that he had not been qualified as an expert refiner, and that the defendant had objected to his attempting to

give testimony of that character. The fact is, however, that he had testified at considerable length concerning refining (*Rec., pp. 833-838*), and this was proper cross examination of such testimony. He would have been compelled to name gasoline as one of the finished commercial products of a petroleum refinery and to have excluded casinghead gasoline from his enumeration, and as he was arguing to the jury that casinghead gasoline was not unrefined, because it was pure, he would thus have destroyed his argument by failing to include it as a refined article.

When it is evident that a paid expert of this character seeks to sustain, by argument and equivocation, the contention he is employed to sustain, it is obviously necessary, in order to show the inconsistencies of his testimony, to do so, by indirection, as it is to be expected that he would otherwise attempt to reply argumentatively in a way to sustain the contention desired.

PART IV (k).

Inflammatory, prejudicial and unfair comment and improper procedure indulged by Government counsel and the court in the presence of the jury resulted in the denial to defendant of a fair trial.

The matters herein discussed are the subject of the following Assignments of Error:

LXXV (*Rec., p. 1632*), statement by Government counsel Payne in the presence of the jury to the effect that defendant and the Gypsy Oil Company were in a conspiracy to misbill the shipments (*Bill of Exceptions, Rec., pp. 273, 274*): LXXVI (*Rec., pp. 1632-1634*), statements by Government counsel Payne in the presence of the jury implying that the witness Timmons was not testifying truthfully, and tending to impeach said wit-

ness, who had been called by the Government (*B. of E., Rec., pp. 307, 308*): LXXIX (*Rec., p. 1638*), statement of Government counsel Payne in the presence of the jury, to the effect that defendant had misrepresented to the carriers in a certain letter (*Ex. 97, Rec., p. 1376*) the commodity to be shipped, and when called upon by the court to show where the alleged misrepresentation was contained in said letter said it was not there in black and white, but there just the same (*Rec., p. 570*): XXIX (*Rec., pp. 1590, 1591*), XXX (*Rec., p. 1591*) and XXV (*Rec., p. 1598*), permitting by the court, over objection, of the persistent reading by Government counsel into questions contents of writings not offered in evidence (*B. of E., Rec., pp. 470-472, 500*): LXXVII (*Rec., pp. 1634, 1635*) and LXXVIII (*Rec., pp. 1635-1638*), statements by the court in the presence of the jury implying that defendant was making technical objections or objections not authorized by law, and suggesting that as a consequence he would keep the parties there three months and adjourn the jury over (*B. of E., Rec., pp. 359, 360, 362-364*); CXVIII (17) (*Rec., p. 1663*), improper comment of Government counsel in summing up, by Government counsel Payne to the effect that the defendant had used improper, illegal and fraudulent means to obtain the establishment of rates intending to falsely bill thereunder (*Rec., p. 935*); by Government counsel Gann, that one of the defendant's experts was an employee of the Mellon Institute, that it was founded by the Mellon family, that Mr. W. L. Mellon is president of the Gulf Oil Corporation, there being no evidence in the record to sustain such statement, and it having a tendency to prejudice the jury against said expert's evidence (*Rec., p. 956*); suggestion by Government counsel Gann that by reason of federal control the Government had suffered financially as a result of the transactions in question, and that the jury and all the general public would have to contribute to make up the amount of which it was alleged

the Government had been deprived (*Rec., p. 906*); comments by Government counsel Chambers upon the wealth of defendant and to the effect that it had deprived the Government of hundreds of thousands of dollars, of which the people would have to bear the burden, and statements to the effect that defendant had violated the safe transportation rules, whereas it was judicially admitted by Government counsel in the course of the trial that defendant had on the contrary complied with such rules (*Rec., pp. 906-908*); further statements by Government counsel Chambers, after having been cautioned by the court, that the mutilated records had been brought to the grand jury with a knowledge of their mutilation which had been concealed from the grand jury, there having been no evidence whatever offered from which even an inference could be drawn as to what had transpired before the grand jury, and the repetition of the suggestion, after warning by the court, by stating that the force and effect of everything was as he had previously said (*Rec., pp. 910, 911*).

Error has been assigned to but a few instances of the character of these herein considered, simply for the purpose of demonstrating how unfairly the case was tried.

As pointed out in Part II of this brief, misbilling is itself an offense for which the Gypsy Oil Company could be (and in fact has been) indicted, which is an entirely different offense from that charged in this indictment. As argued in Part III, this defendant was entitled to a trial on the charge of accepting a concession, and a concession is a thing voluntarily given by the carriers; and to create the impression with the jury that the offense charged would be made out if the jury was convinced that the carriers had been defrauded, was entirely unwarranted and unfair.

In the case of the attempt to impeach the witness Timmons, an unbiased reading of his testimony shows that he testified as fairly and truthfully as a man could, and it

is obvious that Government counsel was simply nettled at his own failure properly to comprehend the subject under discussion and took it out on the witness, and, because the evidence proved unfavorable to the Government's contention, created in the presence of the jury an atmosphere of doubt as to the truthfulness of the witness.

The statements by the court, in the presence of the jury, implying that counsel for defendant were making unreasonable and technical objections, the result of which would be to hold the jury for three months, were highly unfair and unjudicial. Counsel for defendant were earnestly striving to compel a trial of the case on legitimate evidence, and the very fact that the court ultimately sustained the objections made conclusively proves that they were not unwarranted. Defendant's counsel were willing to admit, and ultimately did admit, the relevant facts then being sought to be proved by the Government, which was at first unwilling to take the admissions as offered.

The statements by Government counsel Payne, to the effect that defendant, in its letter *Exhibit 97*, had misrepresented to the carriers the commodity which it was intended to ship, which misrepresentation, although not there in black and white, was there nevertheless, and which he reiterated in summing up, were most unfair, particularly in the light of the fact that defendant had attempted to show by the witnesses Reilly and Powers, and upon objection of the Government had by the court been denied an opportunity to show, what the understanding of the carrier agents was as to the representations contained in the letter in question. Defendant offered to show by the witnesses Reilly and Powers that they were not misled by the letter, but understood it to be in line with the negotiations theretofore undertaken by Mr. Ellis with them, and that they acted upon it on such understanding; and this evidence the court excluded upon the objection of the government. Consequently, it

poorly laid in the mouth of the Government to ask the jury to guess that the carrier agents had been deceived when they themselves had been prevented from telling whether they had or not.

The remarks of Government counsel Gann, implying that Dr. Bacon, because of his connection with the Mellon Institute, was under the domination of Mr. Mellon and therefore, by implication, under the domination of defendant, were absolutely unworthy. Yet it is an insinuation which might tend considerably to influence a jury so far removed from Pittsburgh as to be unlikely to be familiar with the Mellon Institute.

The further suggestion by both Government counsel Gann and Chambers in summing up, that the jury would be financially affected in the way of taxation by the transactions involved, was a most outrageous attempt to influence its action by a plea to its pocketbook. In attempting to reply to this suggestion, counsel for defendant suggested to the jury that such would not necessarily be the case, that if defendant was wrong in its description it was still open to civil suit for the recovery of charges, and as it would be able to respond to such a judgment the jury would not be warranted in assuming that they personally would suffer financially. Government counsel Chambers then took advantage of this statement to attempt further to inflame the jury, by commenting on the wealth of the defendant, and again suggested that the jury would be financially affected by the alleged failure of defendant to pay the proper freight rates. He attempted further to inflame the jury by suggesting that defendant's course in violation of safe transportation rules respecting dangerous articles had jeopardized public transportation. This statement was absolutely unwarranted, the Government itself having conceded that defendant complied with the safe transportation regulations (*Rec., p. 436*).

This character of comments and the refusal of the court to specifically instruct the jury upon the request of defendant that the Government had in fact admitted that the safety regulations had not been violated, instead leaving it to the jury to depend upon its recollection, and the failure of the court to place in the right light before the jury the statements concerning the ability of the defendant to respond in damages, instead of merely leaving the situation that both parties had gone outside the record, was most unfair to the defendant.

As previously stated, only a small portion of the exceptions to comments of the character above noted were assigned as error, and this was done merely for the purpose of showing that defendant did not receive the fair trial to which the Constitution entitled it.

PART IV (I).

The court should have directed a verdict of acquittal.

Assignment of Error LXXXII (*Rec., pp. 1646, 1647*).

At the conclusion of all the evidence, the defendant moved the court to instruct a verdict for defendant upon the ground that the evidence showed that there was involved a question concerning the construction of tariffs filed with the Interstate Commerce Commission, jurisdiction to construe which is exclusively confided to that body, and the trial court without jurisdiction; and upon the further ground that there was a variance between the proof and indictment, and that the defendant was not guilty (*Rec., pp. 899-901*).

The two first grounds, *i. e.*, lack of jurisdiction and variance, have been hereinbefore considered under subdivision (a) of this Part. There remains the further ground that upon all the evidence no case was made out.

If the court should be of the opinion urged in subdivision 1 of (a) of this Part, that it is a matter of judicial knowledge that the material involved in the controversy is not gasoline, it was of course the duty of the trial court to have instructed a verdict for defendant. Even if, however, the court does not so find as a matter of judicial knowledge, it is submitted that the proof overwhelmingly established that the material in question was not in fact gasoline. As hereinbefore stated, no direct proof was offered by the Government in its direct case to the effect that the material was in fact gasoline. The only character of proof was that offered on the theory of admissions, to the effect that the material had been called gasoline at other times and under other circumstances. On rebuttal, the Government did call two expert witnesses, who attempted, in substance, to testify that the material was gasoline. It appeared from their evidence, however, that they simply used the name "gasoline" as interchangeable with "naphtha," so that the question resolved itself not into whether "naphtha" or "gasoline" was appropriate—as it was conceded that both were—but rather as to whether the material was unrefined. There was no attempt to dispute the proposition that it never had been refined by any human agency, but a claim that it had been refined by nature underground, which was obviously but a theory at most. And it was further admitted by these witnesses that their claim that the material was not unrefined was based upon the use of the word "refined" as synonymous with "pure." The proof was overwhelming, however, that the word "refining" as applied to the petroleum industry is not synonymous with "purification," but, so far as purification is involved, it is only incidental, and that refining consists in the necessary processes to produce the finished products of petroleum oil. Upon this evidence the case ought not to have been allowed to go to the jury.

Apart from the foregoing, there was a complete failure of proof on the part of the Government of the averments in the indictment to the effect that defendant knew the gasoline rates alleged to have been in force. Without some proof to substantiate this averment, the practical effect would be to read the word "knowingly" out of the statute. Doubtless the Government would say, in response to this, that it is not necessary for it to offer proof of such knowledge, that shippers are presumed to know the rates. Expressions to that effect may be found in civil cases, but they have absolutely no bearing in a criminal case where knowledge is an essential element of the crime. The more correct expression to have used in such civil cases is that it is immaterial whether a shipper knows the rate or not. He is bound of course by the legal rate so far as his liability to pay it is concerned. This is a wholly different proposition from the requirement of knowledge as an incident to a criminal offense.

In the first *Standard Oil* trial (155 Fed. Rep. 305), Judge LANDIS held, in substance, that a shipper was *conclusively* deemed to know the lawful rate, and excluded evidence tending to show that it did not in fact know the lawful rate. This was one of the questions upon which the Circuit Court of Appeals reversed the judgment of conviction.

> *Standard Oil Co. of Indiana* v. *United States, 164 Fed. Rep. 376.*

The syllabus of the decision of the Circuit Court of Appeals is as follows:

> "Under Elkins Act, Feb. 19, 1903, c. 708, 32 Stat. 847, Sec. 1 (U. S. Comp. St. Supp. 1907, p. 880), making it unlawful for any person or corporation to accept or receive any rebate, concession, or discrimination in respect to the transportation

> of any property in interstate or foreign commerce, and requiring the filing and publication of interstate rates, a shipper cannot be convicted of accepting a concession from the lawfully published rate without proof of knowledge of what such rate in fact was; and hence evidence that the shipper had no knowledge of the published rate, and could only have ascertained the same by construction of several tariff sheets, the application of which was questionable, was admissible."

When the case went back for retrial, Judge ANDERSON, expressing the view that if a tariff were properly posted it might raise a presumption of knowledge against the shipper, ultimately directed a verdict in favor of the defendant for lack of proper proof of establishment of the rate alleged and knowledge thereof.

Whether the proper posting of a tariff might raise a presumption of knowledge, is not here important, because the indictment does not aver, and no proof whatever was offered, that the tariffs were posted. All the indictment avers is that the defendant had knowledge of these rates, and as to this there was not a scintilla of actual proof.

In *United States* v. *Miller*, 223 U. S. 599, an indictment under this act had been quashed by the Circuit Court upon the ground that it failed to allege that the tariffs had been posted in accordance with law. The Court held that it was not necessary that a tariff should be posted to constitute the offense, and, obviously, it was therefore not necessary to aver or prove, in an indictment against the shipper, the fact of such posting. But it is significant to note that in that case the Government pointed out to the court that the indictment charged *knowledge* of the rate by the defendant (*223 U. S. 600*).

Clearly, if the averment of knowledge is necessary in the indictment, it must be proved, and, as before pointed out, an omission of the averment and proof of knowledge would be to read the word "knowingly" out of the statute.

PART IV (m).

Refusal of instructions to the jury requested by defendant was error.

Assignments of Error LXXXIV to CXVI (*Rec., pp. 1648-1660*) cover the following instructions to the jury asked by the defendant and refused by the court:

The instructions given the jury are shown at *pages 912 to 931* of the Record, and those asked by defendant and refused by the court are shown at *pages 931 to 943.*

It is considered that the court erred in denying the instructions requested numbered 2, 3, 4, 8, 9, 11, 12, 13, 15 and 16, for the following reasons:

While the charge clearly enough instructs the jury that it must be convinced beyond a reasonable doubt that the material shipped was gasoline, it nevertheless falls short of the instructions requested and which it is thought ought to have been given, because the jury, although convinced that the material might properly be called "gasoline," may also have believed that it might properly be called *both* "gasoline" and "unrefined naphtha." In such circumstances, the defendant could of course be guilty of no offense in utilizing the description which would accord it the lower of two possible rates. Quite apart from this, even if the jury were convinced that the material was gasoline, and that it could not properly be called unrefined naphtha, it was still necessary that it be convinced beyond a reasonable doubt that the defendant *knew* that it was gasoline *and* did not honestly believe that it could properly be called unrefined naphtha.

Knowledge is of the very essence of the offense under this act. While, as elsewhere pointed out, the defendant would be liable civilly for the lawful charges in the event they had not been collected, regardless of its knowledge or belief in the matter, to constitute an offense

there must be knowledge, and an honest belief of the defendant that the material could properly be called unrefined naphtha, would absolutely preclude a conviction. This would be so even if the jury believed that the material shipped could not be called unrefined naphtha; that it was gasoline, and that defendant knew it was called gasoline, if defendant also honestly believed that it could properly be called unrefined naphtha. This is not to say that it was incumbent upon the Government to disprove honest belief of defendant. But if the jury believed (as from the evidence it might very reasonably have) that the defendant honestly believed the material could properly be called unrefined naphtha, regardless of whatever else it might have been convinced of, it would have to acquit.

As previously pointed out, the conviction in the *Lehigh Coal & Navigation Co. case* was reversed by the Court expressly because the trial court struck out evidence of honest belief of the defendant. Certainly, if such evidence was admissible, it was for the jury's consideration, for such influence as it might have on its conclusion as to whether the element of the offense *knowingly* existed. Such being the case, the defendant here was entitled to have the jury instructed to acquit, if it was convinced that defendant honestly believed the material could properly be called unrefined naphtha.

The whole course of defendant throughout the period involved, of open conduct in relation to the matter, provided the most persuasive of evidence that it did so honestly believe. Why would defendant have notified the initial carrier of its intention to use the new description upon its becoming effective, why would it have placed on every shipping order the notice required and permitted by the regulations only as to shipments of casinghead product, why would it have given the Interstate Commerce Commission inspectors free and voluntary access

to its records, unless it honestly believed the material might properly be called unrefined naphtha?

As to requested instructions numbered 5, 6, 14 and 18, it is considered the court erred in denying them, for these reasons:

As previously pointed out, the offense with which defendant is charged is the acceptance of concessions—not fraudulent misbilling. A concession, to be such, needs to be consciously conceded. If the defendant fraudulently misbilled shipments, and thus by defrauding the carriers obtained transportation at less than lawful rates, it would not be guilty of the offense of accepting a concession, but instead of an entirely different offense —that of misbilling, for which it would be indictable and punishable. It was therefore entitled to have the jury properly instructed in this regard.

Request No. 7, which the court denied, in substance that the jury should not consider the evidence concerning the practice of the Gypsy Oil Company and others in referring to the material shipped as gasoline, as tending to establish that the material was in fact gasoline, but could consider such evidence only as bearing on the knowledge of defendant *after* the jury may have reached the conclusion independently that the material was in fact gasoline, ought to have been granted as the evidence would be wholly inadmissible as pure hearsay unless it was receivable upon the theory of admissions, as pointed out in Subdivision (b) hereof, and in such case the admissions would be receivable only as proving knowledge in order to find the necessary intent, *provided* the jury were independently convinced that the material was in fact gasoline.

Request No. 17, denied by the court, was, in substance, that the jury should acquit unless it was convinced beyond a reasonable doubt that casinghead gasoline is a product of petroleum oil.

As pointed out under Subdivision (h) hereof, the proof offered by the Government in support of the averment concerning rates on gasoline was on gasoline as a product of petroleum. On the other hand, the evidence of both the Government and the defendant's witnesses showed, without dispute, that science does not claim to say positively whether the casinghead gas is or is not a part of petroleum. While it may be reasonably questioned whether the court should have permitted the case to go to the jury at all, because of the fact that in these circumstances it would be impossible for the jury to reach a conclusion beyond a reasonable doubt in the matter, at least it would seem that there is no question that defendant was entitled to have the jury instructed that it must be convinced on the point, however frail the evidence.

Requested Instruction No. 19 sought to have the jury instructed that it must be convinced beyond a reasonable doubt upon each element of the offense.

While some of this request is covered by the charge, there is not a word in the charge covering Subdivision (c) of the request, that is, that the rates alleged in the indictment were known to the defendant or were posted at the stations over which the shipments were made. The statute requires knowledge; the pleader recognized the necessity of charging knowledge of the rates; yet there was no proof of such knowledge offered, and it would not have been possible for the jury to have found, owing to the lack of evidence, that defendant knew the rates.

It is considered that Requested Instruction No. 20 should have been given so that the jury might have understood that the carriers might with entire propriety and in accordance with custom publish a lower rate on a particular commodity under circumstances like those here involved. The refusal of the request left the jury possibly to infer that the very publication of the lower

rates in the situation constituted in itself a concession.

Requested Instruction No. 22 was that if the jury was in doubt whether casinghead gasoline is gasoline, it must acquit.

The evidence was undisputed that the material shipped is called casinghead gasoline. The very crux of the case, however, is whether casinghead gasoline is gasoline. It is considered that the mere instruction that the jury must be convinced that the material shipped was gasoline, was not sufficient, because the jury may have considered that they were so finding in merely finding that the material is known as casinghead gasoline, which fact was of course undisputed.

Requested Instructions 23, 24, 25, 26 and 31 related to questions of intent.

As previously argued, and as is obvious, any act to constitute evidence of intent must be an act before or at the time of the transaction having a tendency to accomplish the offense; or an act indicating guilty consciousness on the part of some one within the scope of whose employment would be embraced, at least in some degree, a relationship to the subject-matter of the offense. There was not a particle of evidence of either character. Yet the charge (*Rec., p. 926*) leaves, and indeed invites, the jury to speculate as to whether or not the erasures offered as indicating conscious guilt might or might not have been made by some responsible agent. If the records in question were records having to do with freight rates, or were records of employees whose duty embraced matters of freight rates, it might be reasonable to permit the jury to draw an inference from a failure to explain the erasures. But, on the contrary, the evidence clearly indicates that they were not records of such a character, but were instead records having no relation whatever to the matter of freight rates and were made by persons whose duties were definitely shown not

to embrace matters affecting freight rates; and consequently, in the absence of any further evidence, it would be the purest speculation in the world from which two diametrically opposite inferences might be drawn, without the slightest degree of greater support for one than the other. In such case the matter is clearly not evidence at all, as it cannot tend to establish any issue in the case.

Refused Instructions 27, 28, 32, 34 and 35 were requests that the court instruct the jury concerning the meaning of the words "refined," "distillation" and "blending."

If, as argued in Subdivision (a) hereof, these words were to be considered in their ordinary meaning, it was the duty of the court to instruct the jury as to the meaning of such words.

Denied Instruction No. 30 was that the jury should not consider the evidence relating to the Texas Company paying the gasoline rate at all, unless and until it was convinced beyond a reasonable doubt that the material shipped was actually gasoline.

As pointed out in Subdivision (d) hereof, it may well be that the Texas Company was overcharged, and the very fact that it sought to recover the difference between the unrefined naphtha rate and the gasoline rate, which the defendant sought to be allowed to show, would negative any inference that the material was gasoline to be drawn from the fact that the Texas Company had paid gasoline rates. To allow the jury to reach the conclusion, based on the evidence that the Texas Company had paid gasoline rates, that the material was in fact gasoline, not only begs the whole question, but emphasizes the error in excluding the evidence offered by defendant to show that the Texas Company subsequently attempted to recover same.

That the denial of Requested Instructions 33, 36, and the instruction requested after the jury had retired, in

response to its request for additional instructions, was most seriously prejudicial to defendant, could not be better demonstrated than by the fact that the jury itself requested the additional instructions on the point involved.

It was most unfortunate, after the refusal to give these instructions in the first instance, that action on the jury's request for them was so long delayed that the jury finally found a verdict without them.

There were offered in evidence, and there was much testimony concerning them, the rules prescribed by the Interstate Commerce Commission concerning the safe transportation of explosive and inflammable articles. As previously pointed out, these rules, during the early part of the period involved, read that the material in question "may be" shipped as gasoline, and recited that when it "is shipped as 'gasoline'," etc., the word "gasoline" being in quotation marks; and during the latter part of the period involved provided that it must be shipped as gasoline, casinghead gasoline, or casinghead naphtha. It is beyond dispute that these rules and regulations are in no sense, and do not purport to be, rate regulations or descriptions for rate purposes, but are purely regulations requiring certain descriptions to be used for purpose of safety.

The evidence showed that throughout the period of time involved on all of the shipping orders there appeared the stamp required by these rules showing that the material shipped was casinghead product. It was of the utmost importance that the jury understand that these were not rate regulations, as of course it might otherwise have found conclusively against defendant on such a supposition. It was likewise of the utmost importance on the question of demonstrating defendant's honest belief in the propriety of its course in designating the material "unrefined naphtha," that the jury take into consideration the fact that in complying with

these regulations—as it was admitted by the Government the defendant had—the defendant clearly made no attempt to conceal the nature of the product, but, on the contrary, branded it so that every one handling it could not help but know what it was that was being called unrefined naphtha.

PART IV (n).

The refusal of the court to set aside the verdict and to arrest judgment and the imposition of sentence, was erroneous.

Assignments of Error CXVII (*Rec., pp. 1660-1664*), denial of motion to set aside the verdict: CXVIII (*Rec., p. 1665*), motion in arrest of judgment: CXIX (*Rec., p. 1665*), sentence.

While it is recognized that a refusal to set aside a verdict and grant a new trial is not generally reviewable, still, where the circumstances show clearly, as it is considered they do here, that defendant was not granted a fair trial, the refusal amounts to an abuse of discretion, which of course is reviewable.

If it be considered that all the evidence ultimately admitted was properly receivable, still it is contended that defendant was so prejudiced by the admission of the evidence concerning the false test by the Government expert Dykema, even though it was later stricken out, and by the failure to furnish the jury instructions expressly requested by them concerning the safe transportation regulations, that the verdict should have been set aside and a new trial ordered. Apart from this, the court expressed its own doubt as to the propriety of letting the case go to the jury in view of the necessity of construing a tariff, and indicated that if it was a personal instead of a corporate defendant he would not do

so. In such case, inasmuch as the Government was persisting in trying the issue in a criminal case in the fashion it did, it would have been reasonable and fair to have permitted the case to go to the jury to afford the defendant an opportunity of acquittal.

On the other hand, on a verdict of conviction in such a situation, it would seem to be the manifest duty of the court to set it aside. Especially so since it was doubtful how much the admission of improper evidence subsequently stricken out may have contributed to the conviction. There is no principle that will justify less fair treatment of a corporation than an individual, and such a theory is absolutely repugnant to the proper administration of justice.

It is considered that judgment should have been arrested, and the indictment dismissed, upon the grounds considered in Part III and in Subdivision (a) of Part IV hereof.

CONCLUSION.

It would seem apparent from a consideration of the evidence, even including that which it is claimed is not admissible, that the conclusion of the Circuit Court of Appeals is inescapable that the material in question could in no proper sense of the word be called "gasoline"; and the Circuit Court of Appeals might well have been warranted in remanding the case for dismissal of the indictment instead of for a new trial. Its judgment should, therefore, be affirmed.

Respectfully submitted,

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